RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15


# महाराष्ट्र शासन राजपत्र

## भाग एक–ल

वर्ष ६, अंक ३०] गुरुवार ते बुधवार, ऑक्टोबर ९-१५, २०१४/आश्विन १७-२३, शके १९३६ [पृष्ठे ४०, किंमत : रुपये २३.००

## प्राधिकृत प्रकाशन

**(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.**

### IN THE INDUSTRIAL COURT AT MUMBAI

APPEAL (IC) No. 135 OF 1996.—Shantaram Vasant Sawant, 7 Chavan Lane, Tambawala Mansion, Third Floor, Room No. 34, Dr. Dadasaheb Bhadkamkar Marg, Mumbai—*Appellant*—*Versus*—The General Manager, BEST Undertaking, BEST House, Mumbai 400 039—*Respondent.*

In the matter of appeal under Sec. 84 of the BIR Act, 1947 against the order dated 11th June 1996 passed by IIIrd Labour Court, Mumbai, in Application (BIR) No. 173/1988.

*Present.*—Shri P. P. Patil, Member, Industrial Court, Mumbai.

*Appearances.*—Mr. S. A. Sawant Advocate for the Appellant.

Mr. R. G. Hegade Advocate for the Respondent.

**Judgement and Order**

(Dated the 3rd October 2003)

1. Appellant Shantaram Vasant Sawant is challenging the order dated 11th June 1996 passed by IIIrd Labour Court, Mumbai, in Application (BIR) No. 173 of 1988 who was pleased to dismiss the application. In fact, Application (BIR) No. 173 of 1988 was filed by the General Secretary, BEST Workers Union for and on behalf of Appellant Sawant, but the said union is not made a party to the present appeal. The impugned order is challenged on the ground that the learned Labour Judge failed to consider that the services of the Appellant should not have been terminated under standing order 26(1) since he was suffering from diabetics and hypertension. In fact, the Appellant should have been invalidated from service as per the agreement dated 6th May 1982, 8th July 1983, 4th April 1985 and 24th September 1985 and should have been paid compensation on account of invalidation. Also ground is made out for challenging the impugned order that the Appellant was retrenched from service, which does not fall under the standing orders and the case of the Applicant comes under item 6 of Sch. III of the Bombay Industrial Relations Act (hereinafter referred to as the BIR Act).

2. The facts in brief of the appeal are as under. The Appellant was working as Cleaner whose services came to be terminated under standing order 26(1) (i) with effect from 11th October 1986 *vide* letter dated 11th September 1986. The Appellant approached the Respondents by his letter dated 7th January 1988 but of no avail. The services of the Appellant should not have been terminated under standing order 26 (1) (i) since he was suffering from diabetics and hypertension. The termination of service of the Appellant is nothing but a retrenchment, therefore, compensation should have been paid to him and failure to this, his termination is void and illegal.

3. The subject matter is not covered under item 6 of Sch. III of the BIR Act, but the same is covered under Sch. I of the Act, as alleged by the Respondent. According to the Respondents, application under Sec. 78 and 79 of the BIR Act not maintainable as there was no strict compliance of Sec. 42(4) of the BIR Act and rule 53(1) of the Bombay Industrial Relations, 1947 (hereinafter referred to as the BIR Rules). The stand of the Respondent was that the letter of approach should have been sent within three months from 17th September 1987. But it was sent on 7th January 1988 which is beyond the stipulated period, Further contention made by the Respondent that in the year 1985 the services of the Appellant were not available on the ground of his illness with effect from 12th September 1985 therefore he did not report on duty till 25 September 1986 and no other alternative except to terminate the services under standing order 26(1) (i) with effect from 11th October 1986.

4. After having been heard both parties, the learned labour Judge was pleased to dismiss the application by order dated 11th June 1996 which is impugned in the present appeal.

5. Heard the learned advocates for the Appellant and the Respondent.

6. Following points arise for my consideration :—

| *Points* | *Findings* |
|---|---|
| 1. Whether the Appellant has proved that the Order dated 11th June, 1996 passed in Application (BIR) No. 173 of 1988 by Third Labour Court, Mumbai, is illegal, erroneous, therefore, liable to be quashed and set aside? | No. |
| 2. What order? | Appeal is dismissed. |

**Reasons**

7. Undisputedly, the services of the Appellant came to be terminated under standing order 26 (1) (i) with effect from 11th October 1986 *vide* letter dated 11th September 1986 because the services of the Appellant were not available for considerable period due to his ill health. The Appellant is disputing the legality of the order termination of his service passed under standing order 26 (1) (i) and according to him, it should have been under standing order 26(2). The stand is taken by the Respondent to maintainability of the application in view of the provisions of Sec. 42(4) of the BIR Act read with rule 53(1) of the BIR Rules. The provisions of Sec. 42(4) of the BIR Act contemplates "any employee desiring a change in respect of any order passed by the employer under standing order or any industrial matter arising out of the application or interpretation of standing orders or an industrial matter specified in Sch. III shall make an application to the Labour Court. Provided that no such application shall lie unless the employee has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived at in respect of the change within the prescribed period." The provision of rule 53 (1) of the BIR Rules prescribes the limitation. According to rule 53(1) of the BIR Rules, "any employee or a representative union desiring a change in respect of any order passed by the employer concerned under standing order or any industrial matter arising out of the application or interpretation of standing order or an industrial matter specified in Sch. III shall make an application in writing to the employer, within a period of three months from the date of such order." After termination of service of the Appellant the

letter dated 8th October 1986 was sent to the General Manager of the Respondent to discuss over the matter and having been discussed, the General Manager declined to do anything, hence the union, which was representing the Appellant before the Labour Court, had sent approach letter on 7th January 1988, If we carefully go through the approach letter, it will be very much clear that after three months from the date of termination of his service, approach letter was sent. The learned advocate for the Respondent has placed reliance on the case Ramu Appa Desai *V/s.* Dawn Mills Co. Ltd. and others reported in 1994 I LLJ 300 Bombay, wherein held in Para 6 :—

> "It is unfortunate that the petitioner workman has missed the bus by reason of issuing approach notice so late. I have no power to relax the mandatory requirement of Rule 53 of the relevant Rules. Both the Courts below were satisfied that the application made by the petitioner under Sec. 78 of the BIR Act was in nature of an afterthought as the petitioners had slept over his alleged rights for a period of more than two years. No case for intervention is made out under Article 226 of Constitution of India."

Further, the learned advocate for the Respondent is placing reliance on the case of Suryabhan Baburao Sathe *V/s.* Bela/ur Sugar and Allied Industries Ltd. reported in 2000 II CLR 751 Bombay, wherein held in Para 4 that :—

> "The position in this respect is beyond any spread of doubt and is very well established that any order passed under the Standing Order can be challenged by filing an application under Sec. 79 read with Sec. 78 of the Act only after compliance of mandatory provisions of Sec. 42 (4) of the BIR Act and Rule 53(1) of the BIR Rules framed there under. There is no provision of condonation of delay in sending a letter of approach and the prescribed limitation under the rule is three months from the date of the order. As I have already given the dates, it is crystal clear and beyound any manner of doubt that the approach letter sent by the petitioner was beyound the prescribed period of limitation of three months under the circumstances, his application was not maintainable and both the Courts below have taken correct view of the matter and have dismissed the application filed by the petitioner. I do not find any reason to interfere with the said order of the Industrial Court. The learned Member of the Court has dealt with the matter squarely and exaustively and theron is no infirmity or illegality of any nature. There is no substance in the petition. The said is to be dismissed. Rule discharged. No order as to costs."

With the help of ratio laid down in the aforesaid cases the argument advanced by the learned advocate for the Respondents and trying to convince as to how the provisions of Sec. 42(4) of the BIR Act and Rule 53 (1) of the BIR Rules are mandatory, therefore, it was obligatory on the part of the Appellant to send approach letter within a period of three months, from the date of passing of the termination order.

8. The learned Advocate for the Appellant has strenuously argued and trying to demonstrate as to how the conduct of the Appellant during service period was fair, *bonafide* and the reason of his absence from duty being his ill health should have been considered by the Respondent and instead of terminating his services, benefits of various agreements/settlements should have been given and considering him as retrenched employee should have been given him alternative employment or compensation.

9. The learned Advocate for the Appellant has placed reliance on the case of Nishar Singh *V/s.* Management of Delhi Transport Corporation reported in 1995 I CLR 490 Delhi, wherein held in para 7 that :—

> "In the light of what is discussed above, the Respondents are directed (1) to formulate a Scheme analeous to the scheme formulated by the Supreme Court preferably within three months from today, (2) to offer the petitioner alternative suitable employment and (3) in case it is not possible to employ him, them the Respondents are directed to consider for payment of compensation to the petitioner in the light of the judgement of the Supreme Court aforementioned."

The learned Advocate for the Appellant during the course of his arguments made submission that this Court can decide propriety and legality of the order passed by employer in the light of the standing order and also in appeal punishment of discharge can be converted into punishment of loss of back wages. The learned Advocate for the Appellant has placed reliance on the case of Sadhana Textile Industries Pvt. Ltd. *V/s.* Gulabchand Gayadin and others, reported in 1993 II CLR 512, wherein held in Para 10 that :—

> "So far as the Labour Court is concerned, it may decide the propriety or legality of an order passed by an employer. If on perusal of the same no impropriety or illegality is found therein, it cannot interfere with the same view a view to substitute its own opinion in place of the employer."

Further it is held in Para 11 (Supra) that :—

> "From a reading of Standing Order 21, it is clear that the various punishments that can be awarded by the employer to a workman found guilty of misconduct have been specified. It starts with the lightest punishment of warning and ends with dismissal without notice. Lesser than dismissal are punishments specified in clauses (*c*) and (*d*) *i. e.* suspension for a period not exceeding 4 days and discharge by giving 14 days notice or by payment of 30 days wages in lieu of notice respectively."

Further held in the supra in the same para that :—

> "Whether the power of the Court is restricted or limited to decide which of the punishments specified in the standing order would be proper punishment for the misconduct in question, or it can modulate the punishment in any manner. The Court can decide and after examining whether the action challenged before it in accordance with standing order and it cannot beyond it."

The learned Advocate for the Appellant is also placing reliance on the case of Municipal Corporation of Greater Bombay, through General Manager BEST Undertaking *V/s.* Industrial Court, Mumbai, and others reported in 1985 I LLN 53, Mumbai, wherein held that :—

> "The Labour Court has power to decide the dispute regarding property or legality of an order passed by employer acting or purporting to act under standing order."

In short, according to the Appellant, the Labour Court has *vide* powers to decide the dispute regarding propriety or legality of an order passed by the Respondent under standing orders. There is no dispute regarding powers of Labour Court conferred by Sec. 78 of the BIR Act and the powers of Industrial Court under appeals is provided by Sec. 84 of the BIR Act. In the instant case, crutial point is if compliance of the provisions of Sec. 42(4) of the BIR Act and Rule 53(1) of the BIR Rules. There are no compliance of the provisions referred above from the Appellant. Therefore, the learned Labour Judge has rightly observed that on account of failure of the compliance by the Appellant of mandatory provisions laid down under Sec. 42(4) of BIR Act and Rule 53 of BIR Rules and rejected the application. The Appellant has failed to show any error or illegality in the impugned order, therefore, I find no substance in the appeal and hence deserves to be dismissed as per the order passed below :—

**Order**

Appeal (IC) No. 135 of 1996 is dismissed.

No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
dated the 3rd October 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

## IN THE INDUSTRIAL COURT AT MUMBAI

REVISION APPLICATION (ULP) No. 38 OF 1999 IN COMPLAINT (ULP) No. 241 OF 1998.—Ramesh N. Shah, 603-B, Sargam Apartments, Shri Vallabh Cross Road, Behind Maruti Nagar, Ashok Van, Dahisar East, Mumbai 400 068—*Applicant—Versus*— (1) M/s. Nahat Industrial Enterprises Ltd., 414 Raheja Chambers, Nariman Point, Mumbai 400 021, (2) Shri S. L. Diwedi, Judge, VIIth Labour Court, Mumbai—*Opponents.*

In the matter of revision application under Section 44 of the M. R. T. U. and P. U. L. P. Act, 1971aganist the order dated 21st November 1998 passed by by VIIth Labour Court, Mumbai, in Complaint (ULP) No. 241 of 1998.

*Present.*—Shri. P. P. Patil, Member, Industrial Court, Mumbai.

*Appearances.*—Mr. H. K. Vaidyanathan, Advocate for the Applicant.
Mr. K. N. Kapoor, Advocate for the Opponents.

### Judgement and Order

(Dated the 29th September 2003)

1. Applicant Ramesh N. Shah is challenging the order dated 21st November 1998 passed in Complaint (ULP) No. 241 of 1998 on the interim relief application Exh. U-2 by VIIth Labour Court, Mumbai, who was pleased to reject the said application.

2. The facts in brief of the revision are as under :—

In the Complaint (ULP) No. 241 of 1998, the Applicant sought relief for reinstatement with continuity of service and back wages by challenging the action of termination of his service. In the said Complaint, he filed application for interim relief claiming reinstatement till pending decision of the Complaint.

3. The Applicant was appointed on 6th June 1997 for a period of 6 months as Accountant on probation and by letter dated 1st January 1998 the services of the Apponent came to be confirmed by the opponent company as per the remarks made thereon. But separate confirmation letter was not issued to him. The opponents by letter dated 16th February 1998 terminated services of the Applicant with immediate effect. This action of the opponents is not in good faith. The service record of the Applicant was unblemished, and without any reason terminated his services in arbitrary and colourable exercise of the employer's right without paying him the legal dues, notice pay etc.

4. The interim relief application was strongly opposed by the opponents on the ground that the services of the Applicant came to be terminated because he was not found suitable for the post of Accountant, therefore, the question of payment of notice pay, retrenchment compensation does not arise. It is contended by the opponents that the Applicant was appointed on probation found not suitable to continue in service, they can terminate service before completition of probation period. It is denied by the opponents that the service of the Applicant was confirmed. According to the Opponents, the services of the Applicant cannot be confirmed before completion of probation period. It is denied by the Opponents that the Applicant was working faithfully, deligently and there was no reason to terminate his services. Lastly, contended by the Opponents that the Applicant was indulged in misappropriation of the Company's funds to the tune of Rs. 3,81,011 as a result, a complaint was lodged to the Cuff Parade Police Station. It is denied by the Opponents that the procedure laid down under Section 25-F and 25-H of Industrial Disputes Act should have been complied with by them. As the Applicant has not completed 240 days of continuous service, not entitled for retrenchment compensation and the notice pay.

5. After having been heard the parties, the learned Labour Judge was pleased to reject the interim relief application by its order dated 21st November 1998 which is impugned in the revision.

6. The impugned order is assailed by the Applicant on the grounds that the action of the opponents is arbitrary illegal and termination of his service is without following the provisions of Sections 25-F and 25-G of I. D. Act and amounts to unfair labour practice.

7. Heard the learned advocates for the Applicant and the opponents.

8. Following points arise for my determination :—

| *Points* | *Findings* |
|---|---|
| 1. Whether the Applicant has proved perversity, illegality or error in the order dated 21st November 1998 therefore liable to be quashed and set aside ? | No. |
| 2. What orders ? | Revision is dismissed. |

**Reasons**

9. For deciding the revision, the documents *viz.* appointment letter of the Applicant dated 6th June 1997, attendance report of the Sales Personnel for the month of December 1997 and the letter of termination of service dated 16th February 1998 are relevant. The appointment letter dated 6th June 1997 speaks about appointment on probation for a period of 6 months and the performance of the Applicant will be assessed during said period and if found suitable, he will be confirmed in service after 6 months. Thus, it is clear that the confirmation of service of the Applicant was subject to the performance found satisfactory during probation period. The attendance report of the Sales Personnel for the month of December, 1997, xerox copy on which endorsement is made to the effect "service of Shri Ramesh Shah is confirmed with effect from 1st December 1997 and below it signed for the Sales Executive, Area Sales Manager. On the basis of the said endorsement, the Applicant is claiming that his services have already been confirmed by the opponent company. The attendance report of the Sales Personnel for the month of December, 1997 is for Mr. S. S. Pagate, TSN; Mr. M. M. Gurav and R. N. Shah. On the top of the attendance report, the name of Rajkumar Sharma is also written. Without evidence of the concerned person, who made endorsement on the attendance report, it is difficult to hold that it was the order of confirmation because no seperate order is issued by the opponents to that effect. According to the opponents, there was no practice to confirm service of employee on the basis of the endorsement made on the attendance report by the executives. The learned Advocate for the opponents has submitted that the endorsement made on the attendance report is nothing but creation of eviden by the Applicant to suit his claim. The letter of termination of service dated 16th February 1998 takes immediate effect. The representation was made by the Applicant after he received the letter of termination of his service requesting the opponents to review the decision of termination of his service.

10. The learned Advocate for the opponents made submission that the employer has every right to terminate service of an employee if the performance of the concerned employee during the probation period found unsatisfactory. To substantiate his argument, he has placed reliance on the case of Prafull D. Pore *V/s.* J. K. Chemicals and others reported in 1989 (59) FLR Bombay, wherein held in Para 21 :—

> "It is true that according to the Bombay Industrial Employment (Standing Orders) Rules, 1959, the petitioner could not have been treated as temporary employee or as probationer having completed three months, uninterrupted service. But that does not mean that the Respondent could not judge his ability and find out whether the services of the petitioner were satisfactory or not. Therefore, in my view in the present case, it cannot be said that the services of the petitioner were terminated on an alleged ground of misconduct or any such ground was made a foundation for the purpose of discharging him."

Further, the learned Advocate for the opponents has streneously argued that the bare statement of an employee of putting continuous service of 240 days would not sufficient, unless it is proved by strong proof of evidence and to substantiate this argument, he is placing relience on the case of the Range Forest Officer *V/s.* S. T. Hadimani reported in 2002 LLR 339 SC, wherein held in Para 3 that :—

> "Filing of an affidavit is only his statement in his favour and that cannot be granted as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman."

According to the opponents, when the appointment of the Applicant was on the probation period and his prefermence was found unsatisfactory, in such case, termination of service not amount to retrenchment within the meaning of Sec. 25-F of ID Act. The Opponent is taking help of the ratio laid down in the case of Anthony O. Silva *V/s.* VSV Nevaji and others reported in 1989 (59) FLR 307 Bombay. Wherein held that :—

> "The petitioner has joined that Bank as Trainee Officer whose services were terminated after completion of one year service. The petitioner was not in regular employment as he was taken as a trainee officer. The trainee officer has to undergo training exclusively and on completion of training, he was to be taken in regular employment of the Bank. In this view of the matter if the services of the petitioner terminated on his failure to pass the test is no way *bad in law*. "

The learned Advocate for the Opponents during course of his arguments has given more emphasis, on differentiating the two terms *viz.* illegality and unfair labour practice. According to him, more showing illegality is not enough. He has placed reliance on the case of Hemant Govind Vaidya *V/s.* Vasant Dada Sugar Institute and Ors. reported in 2000 (86) FLR 49 Bombay, wherein held that :—

> "In absence of proof, the decision of the management was not in good faith or it suffers from motive or ulterior motive, the allegation does not constitute an unfair labour practice. But to constitute an Act of unfair labour practice, much more is required to be pleaded and proved."

The learned Advocate for the Opponents has placed reliance on the case of General Workers Union *V/s.* Sangli Municipal Council, Sangli, reported in 1984 (48) FLR 411 Mumbai, wherein held that :—

> "There is difference between an illegal Act and an unfair labour practice. What the Complainant under the Act has to prove is an unfair labour practice and not merely that the Act is illegal."

I am in agreement with the submission made by the learned advocate for the Opponents on the point that the Applicant is under an obligation to establish that the action if the Opponents amounts to unfair labour practice because the order of termination of his service even though pressumed to be an illegal act, but that does not mean that such action covers under the term of unfair labour practice. The unfair labour practice has to be established independently by the Applicant. The last submission made by the learned advocate for the Opponents is to the relevant provision of Sec. 44 of the M.R.T.U. and P.U.L.P. Act and taking help of the provisions of said Section is trying to demenstrate as to how the revisional Court has limited powers conferred upon it, there are cannot travel beyond the provisions of Sec. 44 of the M. R. T. U. and P. U. L. P. Act, and in support of his argument is placing reliance on the case of Divisional Controller, MSRTC Amravati *V/s.* Vinay Palwankar and others reported in 1999 I CIR 1245 Bombay and Pest Control (I) Pvt. Ltd., *V/s.* Pest Control (I) P. Ltd., Employees All India Union reported in 1994 I CLR 230 Bombay. The ratio laid down in both the cases is that the revisional Court cannot act like an appellate authority taking task on duties of reappreciating the evidence while exercising the powers laid down under Sec. 44 of the M.R.T.U.

and P.U.L.P. Act, therefore, the Industrial Court should be extremely slow in interferring with the findings of the Labour Court. There is no doubt on conferring the limited powers to the Industrial Court by the provisions of Sec. 44 of the MRTU and PULP Act and beyond the scope of the said provision, the revisional Court cannot travel.

11. The learned advocate for the Applicant has submitted that the services of the Applicant was confirmed as per endorsement dated 1st January 1998 made on the attendance report for the month of December, 1997, therefore, without complying with the provisions of Sec. 25-F of ID Act, the action of terminating the services of the Applicant is an unfair labour practice, hence the Applicant is entitles for reinstatement even at the interim stage. Whether the service of the Applicant was confirmed or not is the matter of evidence and merely on the basis of endorsement on the attendance report, not sufficient to held at this juncture that the action of the Opponents is an unfair labour practice. Opportunity is still available with the Applicant to prove action of the Opponents in terminating his services without comliance of the provisions of Sec. 25-F, 25-G of the ID Act is an unfair labour practice after leading oral and documentary evidence while deciding the complaint on merits. The learned labour Judge *prima facie* found that the Applicant has failed to make out case for granting interim relief. Balance of convenience is one of the criteria to be considered while deciding the interim relief application. In the instant case, if the Applicant after leading evidence prove the action of terminating his service by the Opponents is an unfair Labour practice, certainly he can be compensated and there is no possibility of causing hardships or irreparable loss. In this background of the matter, I do not find perversity or illegality in the impugned order, therefore, in the result, the revision deserves to be dismissed as per the order passed below :—

**Order**

(1) Revision Application (ULP) No. 38 of 1999 is dismissed.

(2) No order as to costs.

(3) Records and preceedings of Complaint (ULP) No. 241 of 1998 be sent to VIIth Labour Court, Mumbai.

(4) Parties are directed to appear before VIIth Labour Court, Mumbai on 30th October 2003.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 29th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 3rd October 2003.

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## IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. P. PATIL, MEMBER

REVISION APPLICATION (ULP) No. 26 OF 2002.— M/s. Oberal Flight Services, Sahar Airport Road, Sahar, Mumbai 400 099—*Applicant—Versus*—(1) Mr. Rajnikant Raut, Room No. 5, Fernandes House, Churanphakkadi, Sahar Village, Sahar, Mumbai 400 099, (2) The Hon'ble 6th Labour Court, New Administrative Bldg., Bandra (East), Mumbai 400 051—*Opponents.*

CORAM.—Shri. P. P. Patil, Member.

*Appearances.*—(1) Shri Rajesh Hukeri, Advocate for the Applicant.
(2) Shri S. A. Sawant, Advocate for the Opponents.

### Judgement

(Dated the 16th September 2003)

The Applicant (Employee) is challenging the order dated 13th December 2001 passed by Labour Court, Mumbai in Complaint (ULP) No. 126 of 1998 on the issue of perversity of findings.

Facts in brief in Revision are as follows :—

1. Non-Applicant No. 1 was in the employment of Applicant as a Airconditioner Mechanic. The Non-Applicant has started all the three Airconditioner Plants at a time without permission. Which was resulted into damaging of two Pistons of Compressor. The act of Non-Applicant would have resulted into bursting of chillers. The Non-Applicant was also charged with other serious offences of the same date. When he was asked to carry out repair work at deep liquid line valve Nut at 11-00 a. m. by his superior he has not carried out job till 3.30 p. m. Which was resulted into heave freeon 22 gas leaked costing Rs. 5000. Pursuant to the chargesheet dated 29th October 1996, the Applicant have conducted domestic enquiry against Non-Applicant. After the enquiry was completed. Enquiry Officer has submitted Report on 10th February 1998 on the basis of which service of Non-Applicant terminated on 2nd March 1997. The action of termination of service of Non Applicant Challenged by the Non Applicant in Complaint (ULP) No. 126 of 1998 under item 1, a, b, c, d, f and g of schedule IV of M.R.T.U. and P.U.L.P. Act. On the basis of pleadings of the parties learned Labour Judge was pleased to frame preliminary issue of fairness of enquiry and decides the issue of fairness of enquiry. Learned Labour Judge by its order dated 29th February 2000 held the enquiry was fair and proper. Thereafter, the issue of findings of Enquiry Officer whether perverse or not has considered by the learned Labour Judge by order dated 13th December 2001 and held that findings of Enquiry Officers are perverse, the same is impugned in the revision.

2. The Applicant is assailing order dated 12th December 2001 on the grounds of re-appreciation of evidence which is not permissible in law and declaring that finding given by Enquiry Officer is without Application of mind. Also the grounds raised by Applicant for challenging impugned order. On the basis ration laid down by Hon'ble Supreme Court in various cases cited before Labour Judge failed to appreciate in correct perspective and in appropriate spirit of Law.

3. Heard Learned Advocate for Applicant and Hon-Applicant. Following Points arise for determination :—

| *Points* | *Findings* |
|---|---|
| 1. Whether Applicant has prove that as order dated 31st December 2001 is erroneous, illegal and suffers with perversity, therefore, it liable to be quashed and set aside ? | Yes. |
| 2. What orders ? | As per final order passed below. |

### Reasons

4. At the out set there is no dispute of employment of Non-Applicant in the establishment of the Applicant and was discharging the duties as a Airconditioner Mechanic. Who was

served with chargesheet dated 29th October 1996. The charges levelled against Non-Applicant that he had started all the three Airconditioner Plants at a time without permission which was resulted in damaging of two pistons of compressor. Other serious charges are like not obeying the direction of superiors to carry out repair work at deep liquid line and Valve nut, which resulted of heave freeon 22 gas leak coating of Rs. 5000. Domestic enquiry was conducted against the Non-Applicant and on the basis of report of Enquiry Officer, services of Non-Applicant came to be terminated from 2nd March 1998. The action of termination of services of Non-Applicant is challenged before 6th Labour Court, Mumbai in Complaint (ULP) No. 126 of 1998 in which the issue of fairness of enquiry was decided as preliminary issue by order dated 29th February 2000. The learned Labour Judge by order dated 29th February 2000, held the enquiry was fair and proper. Thereafter, learned Labour Judge was pleased to decide the issues of findings of Enquiry Officer whether perverse or not. By an order dated 13th December 2001. Learned Labour Judge held the findings of Enquiry Officer are perverse. The Learned labour Judge was pleaded to interfere with the findings of Enquiry Officer on two grounds, firstly, that Enquiry Officer has failed to apply his mind while considering oral and Documentary evidence in enquiry and with Predetermined of mind and grudge given such finding against Non-Applicant, and secondly, the evidence and material on record appreciated by the Enquiry Officer with bias mind. Learned Advocate for the Applicant has invited attention of the Court of the observation made by learned Labour Judge in its judgment/order particularly the observation in Para 3 which is reproduce below in :—

> "It does not appear from the findings of the Enquiry Officer, that the Enquiry Officer had applied his mind to oral and documentary evidence in the enquiry. The enquiry record show that he had recorded findings with pre-determine mind and grudge to prove and establish the charges against the Complainant."

Further, the learned Advocate for the Applicant has pointed out the observations made by learned Labour Judge in its judgement/order in Para 5 which is reproduce below in :—

> "The learned Counsel Shri Hukeri appearing for the Respondents placed reliance on the decisions of Supreme Court reported in 1972 II LLJ. Page No. 328. Judgement of the Supreme Court reported in 1962 II LLJ page No. 772, Judgement of Supreme Court reported in 1979 AIR SC. 2529. Judgement of the Supreme Court reported in 1982 I LLJ Page No. 46. Judgement of the Supreme Court reported in 1996 II CLR Page No. 345 on the point of to decide the perversity of the findings, in the enquiry. The facts in the present case were different from the decided case. The principle laid down in these Judgements would not be applicable to the facts of the present case. In fact, evidence was very clear. But the Enquiry Officer had twisted the evidence to draw wrong conclusion."

The grievances of Applicant is of not considered the ratio laid down by Hon'ble Apex Court in various Judgements made available for perusal and without any material interferred with the findings of Enquiry Officer on the grounds pre determined and grudge to prove any how charges against the Non-Applicant. Learned Advocate for the Applicant has placed reliance on the case Lakshmi Precision Screws Ltd. *V/s.* Ram Bahagat reported in 2002 LIR SCW 3324 where in held in Para 7 :—

> "The question about the limit of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals."

Further held :—

> "There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal an result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact."

In short according to Learned Advocate for the Applicant when the findings of fact is based on any mis-provision of evidence that would be deemed to error of Law which can be corrected by this Court. It is pertinent to note that the parties have filed written submission on the point of perversity of findings to facilitate the Labour Court to go through the controversial issues. According to Applicant Learned Labour Judge failed to go through written submission made by them carefully including ratio laid down in the cases decide by the Hon'ble Apex Court. Learned Advocate for the Applicant further pointed out cases and ratio laid down therein detailed given in the written submission which are not considered by the learned Labour Judge. There are total six cases which were cited by the Applicant decided by Hon'ble Apex Court and ratio laid down therein, but all these cases have not taken into consideration by the Learned Labour Judge on the ground that facts are not identical with facts of present case. The objection of Applicant to such observation is that ratio laid down in all cases are on legal proposition therefore, the findings given by Learned Labour Judge that ratio not applicable to this case because the facts are not identical, are erroneous findings.

5. Learned Advocate for the Non-Applicant has invited attention of the Court to the written submission given by them in respect of perversity of the findings of Enquiry Officer and made submission on the point of showing Non-Applicant of cancer patient without any base and evidence. Learned Advocate for the Applicant has tried to convince the Court that findings recorded in domestic enquiry if not supported by an evidence in that case only the findings can be said to be perverse. Learned Advocate for the Applicant has taken me through the enquiry report and pointed out as to how enquiry officer dealt with the oral and documentary evidence and after carefully scrutinising it, given the findings.

6. Learned Advocate for the Non-Applicant during course of argument has submitted that the provision of section-44 of M.R.T.U. and P.U.L.P. Act confers limited power/jurisdiction to the Industrial Court while dealing with revision. Further, he adds that Industrial Court can not travel beyond scope of provision is M.R.T.U. and P.U.L.P. Act, and has no power to reassess or re-appriciate the evidence. The Court is in agreement with such submissions that the Court can not go beyond the scope of section-44 of M.R.T.U. and P.U.L.P. Act and only in case order/ Judgement patently based on erroneous findings or the Labour Court did not consider legal aspect certainly Industrial Court has jurisdiction to interfere with the Judgment order of Labour Court in appropriate case. In the instant case learned Labour Judge failed to take into consideration the legal submissions advanced by the Applicant and relevant case laws in a correct perspective manner. Therefore, the impugned order suffers with perversity and arbitrariness. It is a fit case in which interference is called for in the interest of parties and for just decision. In this background, it is necessary to remand the case to decide according to law hence page the following order :—

**Order**

(1) Revision is hereby allowed.

The order dated 13th December, 2001 is quashed and set aside. The case is remanded to Six Labour Court, Mumbai to decide according to law on the point of perversity of findings of Enquiry Officer after giving an opportunity to the parties for oral submission if they desire.

Record and proceedings of Complaint (ULP) No. 120 of 1998 be sent to 6th Labour Court, Mumbai. No costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 16th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
dated the 23rd September 2003.

## IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) No. 217 OF 1996.—(1) Shahji Baburao Kshirsagar, (2) Girish Nagesh Suvarna, All C/o. Maharashtra Kamgar Sangh Shakti, 135 Shankar Tekdi, Mulund, Mumbai 400 082 —*Complainants—Versus*—(1) M/s. Bombay Oxygen Corporation Limited, LBS Marg, Mulund, Mumbai, (2) The Manager, M/s. Bombay Oxygen Corporation Limited, LBS Marg, Mulund, Mumbai 400 082—*Respondents.*

In the matter of complaint of unfair labour practices under item 9 of Sch. IV of the M.R.T.U. and PULP Act, 1971.

*Present.*—Shri. P. P. Patil, Member, Industrial Court, Mumbai.

*Appearances.*—(1) Mr. G. N. Shetia, Advocate for the Complainant.

(2) Mr. S. V. Alva, Advocate for the Respondents.

### Judgement and Order

(Dated the 20th September 2003)

1. The complaint is under item 9 of Sch. IV of the MRTU and PULP Act, 1971. The Complainants are claiming that the Respondents engaged in unfair labour practices under item 9 of Sch. IV of the MRTU and PULP Act, 1971 by not paying them DA, HRA as per the principle of 'equal pay for equal work'.

2. The facts in brief of the complaint are as under :—

The Complainants are working in the establishment of the Respondents, as unskilled workers. The services of the Complainants were terminated by order dated 26th November 1987 and this action was challenged by the Complainants in Reference (IDA) No. 844 of 1988 before XIth Labour Court, Mumbai. XIth Labour Court, Mumbai, was pleased to allow the said reference by setting aside the order of termination of their services and directed the Respondents to reinstate the Complainants on their Original posts in continuity of service and pay them full back wages. The Respondents had filed writ petitions against the said order *vide* writ petitions No. 675/1994 and 760/94 before the Hon'ble single Judge of our Bombay High Court which came to be dismissed, therefore, Appeals Nos. 471/1994 and 472/1994 were preferred before the Hon'ble Division Bench of our Bombay High Court and these appeals were also came to be dismissed by order dated 24th November 1995.

3. The Respondents have paid basi salary of Rs. 600 per month and denied the dearness allowance and house rent allowance. By not paying the dearness allowance and house rent allowance on the principle of equal pay for equal work amounts to unfair labour practice covered under item 9 of Sch. IV of the MRTU and PULP Act. Hence, filed the present Complaint.

4. The Respondents have adopted the reply Exh. C-3 as their written statement wherein it is contended that they have not engaged in any unfair labour practice covered under item 9 of Sch. IV of the MRTU and PULP Act by not paying the dearness allowance and house rent allowance on the principle of "equal pay for equal work." Further contended by the Respondents they have fully complied with the award dated 8th November 1993 passed by the Labour Court, Mumbai in Reference (IDA) No. 844 of 1988, hence the present complaint is not maintainable.

5. According to the Respondents, as per observations in Para 12 of the award dated 8th November 1993, directed them to pay last drawn salary by the Complainants at Rs. 600 p. m. and it is regularly paying them. Lastly contended by the Respondents in their written statement that in the award dated 8th November 1993 nowhere it is mentioned that the Complainant should be paid additional dearness allowance or house rent allowance. Therefore, the prayer of the Complainants cannot be granted as this Court is not the appropriate forum to raise a fresh demand on the basis of equal pay for equal work.

6. On the basis of the pleadings, the following issues are framed :—

| *Issues* | *Findings* |
|---|---|
| 1. Whether the Complainants have proved that the Respondents engaged in unfair labour practice covered under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971 from 24th November 1995 ? | Yes. |
| 2. Whether the Complainants have proved that they are entitled on the basis of equal pay for equal work for dearness allowance and houserent allowance, as prayed ? | Yes. |
| 2. What order ? | Complaint is allowed. |

**Reasons**

7. Admittedly, the actions of the Respondents in terminating services of the Complainants by order dated 26th November 1987 have been set aside and directed to reinstate them on their Original posts in continuity with service and pay them full back wages as per the Award passed by the Labour Court, Mumbai. Accordingly, the Complainants have been reinstated in service. Their grievance is that they are entitled for dearness allowance and house rent allowance on the principle of equal pay for equal work. The Complainants have filed purshis Exh. U-10 and thereby declined to lead any oral evidence. The Respondents have examined their witness Mr. M. Wellukuty Nair. Witness of the Respondents Wellukutty Nair has admitted that award was passed by the Labour Court, Mumbai, on 8th November 1992 which was upheld by the Hon'ble High Court and Supreme Court. According to witness Wellukutty Nair, the Respondent company has complied with the said award and the wages were paid to the Complainants for the period the reference was pending before the Labour Court till the order was passed by the Hon'ble Supreme Court. The witness Wellukutty Nair has admitted in his cross examination the fact mentioned in the award of the Labour Court regarding payment of dearness allowance to workmen, but the Respondents have not paid dearness allowance to the Complainants. Further witness Wellukutty Nair has admitted in cross-examination that except these 2 Complainants, dearness is paid to other workmen. Thus, witness Wellukutty Nair examined by the Respondents has made it everything clear in respect of payment of dearness allowance. When the Respondent company is paying dearness allowance on the basis of the award passed by the Labour Court to other workmen, why this facility is denied to the present Complainants. For this reason no explanation coming forth from the Respondent company. According to the Respondent company, they have implemented the award passed by the Labour Court. But it shows that the Respondent company had not fully complied with the said award, because it is specifically mentioned in last para of the award dated 8th November 1993 passed in Reference (IDA) No. 844 of 1988, a copy of which is placed on record, "the Company was paying travelling allowance to the workmen but has not paid dearness allowance to which the workers are legally entitled." On the basis of the said observations made in the award dated 8th November 1995 by the learned Labour Judge and with the help of corroborative evidence of the Respondents witness Wellukutty Nair, the Complainants have sufficiently established that they are entitled to dearness allowance.

8. The learned advocate for the Respondents has strenuously argued on the point of sperate Complaint (ULP) No. 198/2001 is filed by the Complainants after passing of the order by the Hon'ble Supreme Court and the same is pending for identical relief, therefore, the present Complaint needs to be dismissed. Further, he urged that the Complainants have come with fresh demand of dearness allowance and house rent allowance for which separate adjudication under reference is required. Witness Wellukutty Nair has admitted in his cross-examination about the agreements entered into between the union and the Respondent company. If the union and the Respondent company arrived at terms and conditions in respect of payment of

house rent allowance by way of agreement, under such circumstances, the Respondents cannot deny this demand also. Thus, the payment of house rent allowance depends upon the terms and conditions settled between the parties either by way of agreement or long standing practice followed. But the Respondent Company is bound to pay dearness allowance as this facility is being extended to other workmen. Not paying the dearness allowance as per the award passed by the Labour Court, Mumbai, amounts to unfair Labour practice covered under item 9 of Sch. IV of the MRTU and PULP Act. In respect of house rent allowance, no material is brought on record by the parties, therefore, if such facility is provided by the agreement between the parties or observed it with the long standing practice, under such circumstances, the present Complainants are entitled for this benefit also. Having been considered the oral and documentary evidence, this Court is constrained to take view that the Respondents have engaged in unfair labour practice covered under item 9 of Sch. IV of the MRTU and PULP Act, by not extending the benefits/facilities in compliance with the award. Therefore, the present complaint deserves to be allowed as per the order passed below :—

**Order**

(1) Complaint (ULP) No. 217 of 1996 is allowed.

(2) It is hereby declared that the Respondents engaged in unfair labour practices covered under item 9 of Sch. IV of the MRTU and PULP Act, 1971.

(3) The Respondents are hereby directed to pay to the Complainants dearness allowance as per the awards passed by the Labour Court, Mumbai.

(4) The Respondents are further directed to pay house rent allowance to the present Complainants if this facility is extended to other workmen of the Company.

(5) No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 20th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 9th October 2003.

## IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) Nos. 956 OF 1996 and 35 OF 1997—COMPLAINT (ULP) No. 956 of 1996.— Maharashtra Shramik Sena, 16 Vinayak Sahakari Grihnirman Sanstha Maryadit, Bandra East, Mumbai 400 051—*Complainant—Versus*—(1) General Manager, Greater Bombay Milk Scheme, Worli Dairy, Mumbai 400 018, (2) Dairy Development Commissioner, Greater Bombay Milk Scheme, Worli Sea Face, Mumbai-18—*Respondents*.

In the matter of complaint of unfair labour practices under items 5 and 9 Sch. IV of the MRTU and PULP Act, 1971.

COMPLAINT (ULP) Nos. 35 OF 1997.—(1) Shri D. R. Shigavan, Time Keeper, (2) Shri B. N. Gadge, Time Keeper, (3) Mrs. M. N. Prabhu, Time Keeper, (4) Smt. L. E. Makhamale, Time Keeper, (5) Mrs. S. R. Korgaonkar, Telephone Operator, (6) Mrs. S. S. Gidh, Time Keeper, (7) Mrs. K. C. Handore, Milk Despatcher, (8) Mrs. J. J. Shende, Returned Milk Checker, (9) Shri M. P. Patil (Gopan), Telephone Operator, (10) Shri J. R. Yadav, Milk Despatcher, (11) Shri R. O. Sonawane, Telphone Operator, (12) Mrs. R. R. Parab, Milk, (13) Mrs. H. H. Ghag, Telephone Operator, (14) Mrs. S. R. Sandav, Raw Milk Receiving Clerk, (15) Shri D. S. Naikare, Time Keeper, (16) Shri L. G. Bhadekar, Milk Despatcher, (17) Shri S. S. Shiroorkar, Milk Despactcher, (18) Shri M. A. Shaikh, Time Keeper, (19) Shri. G. D. Tankar, Time Keeper, (20) Shri S. S. Badkar, Time Keeper, (21) Mrs. A. A. Khadilkar, Time Keeper, (22) Mrs. S. P. Kurle, Tallying Clerk, (23) Shri D. K. Kotecha, Milk Despatcher, (24) Shri. K. K. Gawde, Milk Despatcher, (25) Mrs. A. K. Sabnis, Milk Despatcher, (26) Shri. K. K. Patekar, Milk Despatcher, (27) Smt. P. P. Bankar, Milk Despatcher, (28) Mrs. P. M. Chauhan, Bottle Checker, (29) Shri. M. B. Humne, Bottle Checker, (30) Shri. L. R. Bagwe, Raw Milk Receiving Clerk, (31) Shri. S.P. Dode, Raw Milk Receiving Clerk, (32) Shri. K. S. Bhekre, Milk Despatcher, All working in Kurla, Goregon and Worli Dairy of Greater Bombay Milk Scheme, Worli, Mumbai 400 018—*Complainants—Versus*—(1) The Secretary to the Govt. of Maharashtra, Agriculture and Co-operation Department, Mantralaya Mumbai-400 032, (2) The General Manager, Greater Bombay Milk Scheme, Worli, Mumbai-400 018, (3) The Commissioner, Greater Bombay Milk Scheme, Worli, Mumbai-400 018, (4) Shri. S. I. Shaikh, (5) Shri. H. U. Mujawar, (6) Shri. D. A. Patankar, (7) Shri. R. N. Tarfe, (8) Shri. V. V. Naik, (9) Shri. N. P. Redkar, (10) Shri. A. N. Bhurke, (11) Shri. B. B. Kubal-Respondents 4 to 11 working at Greater Bombay Milk Scheme, Worli and Aarey/Kurla Dairy, Mumbai—*Respondents.*

In the matter of complaint of unfair labour practices under items 4(*c*), (*d*), (*f*) of Sch. II and under item 5 of Sch. IV of the MRTU and PULP Act, 1971.

*Present.*—Shri. P. P. Patil, Member, Industrial Court, Mumbai.

*Appearances.*—(1) Mr. S. S. Pathak, Advocate for Maharashtra Shramik Sena for Complainant in Comp. (ULP) No. 956/1996. Mr. R. G. Jagtap for the Complainants in Complaint (ULP) No. 35 of 1997. Mr. R. H. Jadhav Advocate for the Respondents in both the Complaints.

### Common Judgement and Order

(Dated the 29th August 2003)

Complaint (ULP) No. 956 of 1996 is filed by Maharashtra Shramik Sena challenging the draft seniority list of 1995 and the earlier seniority lists and claiming promotion with retrospective effect on the post of milk despatching supervisors. In Complaint (ULP) No. 35 of 1997, the dispute is raised by the Complainants to the seniority lists prepared and published under letter dated 26th November, 1996 and claiming the seniority lists of 1982, 1983 and October, 1995 be confirmed. Thus, the dispute being related to the seniority list of the category of employees covered under executive group working in the establishment of the Respondents Nos. 1, 2 and 3 both the Complaints are being disposed of by this common judgement and order.

2. The facts in brief of Complaint (ULP) No. 956 of 1996 are as follows :—

The Maharashtra Shramik Sena (hereinafter referred to as the Complainant union) is a trade union registered under the Trade Unions Act, 1926, who is claiming relief for total 9 employees (their members) as mentioned in Annexure-A filed with this Complaint, (hereinafter referred to as the Annexure-A). The Respondents are employing milk despatchers, bottle checkers, RMRD clerks, who are the members of the Complainant union, Due to the abolishion of the post of Full Time Centre Sales Manager, they were accommodated during the period from 1976 to 1983 to the post where the employees mentioned in Annexure-A were working, although the said posts are of lower grade. Because of full time centre sales managers absorption on the post and place of the workers in Annexure-A, the seniority of said workers was affected as they were shown as juniors to the full time centre sales managers. There are two groups *viz.* administrative group and executive group in the Respondent undertaking and the concerned employers fell under the executive group. The seniority lists of the executive group was published in the years 1983, 1994 excluding the telephone operators. The seniority list of the telephone operators was separately prepared. In the seniority list of 1983 of the executive group, the concerned employees were shown as seniors. In the year 1995, again draft seniority list was published by the Respondents changing the seniority of the concerned employees by showing the full time centre sales managers as seniors. As per the Govt. Resolution dated 12th May 1962, particularly clause (*f*) of the said circular, the seniority list should have been prepared by the Respondents. But the Respondents *mala fide* and high handedly did not follow the Govt. Resolution dated 12th May 1962. The Respondents did not take appropriate steps to the representations made by the concerned employees. Again the draft seniority list of 1995 was published. On the contrary, the junior employees have been promoted on the basis of the draft seniority list of 1995 without considering the representations of the concerned employees. Again, letter dated 15th March 1996 was sent to the Respondents requesting to withdraw the draft seniority list of 1995. Deputy Dairy Commissioner issued directions on 19th March 1996 to the General Manager directing the seniority of full time centre sales managers be shown from the date when they have been absorbed on the post of the milk despatchers and they shall not be given the same scale and grade but no appropriate action was taken by the Respondents in pursuance of the said letter.

3. Because of seperate seniority list of the telephone operators was prepared in the year 1994, they are shown in the higher category although in the year 1983 in a common seniority list of the said telephone operators were in the same category, the Respondents started giving promotion to the juniors. The telephone operators have been shown in higher category by way of promotion. The employees working on the said post have been promoted to the post of milk dispatch supervisor as per the letter dated 20th September 1996, which is patently illegal and arbitrary, therefore, necessary to direct the Respondents to withdraw the draft seniority list of 1995 as well as promotions given to the telephone operators on the basis of the letter dated 20th September 1996 and consider the claim of the concerned employees for promotion on the post of milk despatch supervisor with retrospective effect.

4. The Respondents have filed their written statement at Exh. C-3 thereby raising the preliminary objection to the maintainability of the Complaint on the ground that the Complainant union is neither the recognized union nor a representative union. The Respondents have denied the allegations of engaging in any unfair labour practices covered under items 5 and 9 of Sch. IV of the MRTU and PULP Act. The Respondents have admitted the issuance of the letter dated 20th September 1996 but subsequently it was withdrawn by its office order dated 1st October 1996. According to the Respondents, the pay scale of the full time centre sales managers was equivalent to the pay scale of the concerned employees. It is contended by the Respondents that the full time centre sales managers have been transferred and absorbed in executive group where the concerned employees were working. It is admitted by the Respondents that the seniority list of was published in 1983 of all executive groups as well as in the year 1995. Further admitted by the Respondents that in 1995, the seniority list of telephone operators was

seperately prepared. According to the Respondents, the draft seniority list in 1995 was prepared, which was subject to the correction Lastly contended by the Respondents about withdrawal of the order/letter dated 20th September, 1996 as per the office order dated 1st October, 1996, therefore, nothing remains in the Complaint.

5. COMPLAINT (ULP) No. 35/1997. The facts in brief of the Complaint are as follows :—

There are gazetted and non gazetted staff members appointed by the Respondents No. 1 to 3 for the purposes of distribution of milk. There is executive group of Class III non gazetted employees and they are engaged at three senters *viz.* Kurla, Goregaon and Worli. The Complainants are members of Durgdhashala Kamgar Sanghatana duly registered under the Trade Unions Act and affiliated with Greater Bombay State Govt Employees Federation, Mumbai. The Respondents Nos. 4 to 11 are members of the rival union of Shiv Sena party *viz.* Maharashtra Shramik Sena. There is a conflict between the unions on the policy matters and taking advantage of this, the Respondents Nos. 1 to 3 while fixing seniority or giving promotion shown favours to the Respondents Nos. 4 to 11.

6. The Complainants are working with Respondents Nos. 1 to 3 since 1964. Initially, they were appointed on the post of full time centre sales managers. In 1980, the Respondents Nos. 1 to 3 decided to run milk centres by parties, therefore, till 1992 all the centres were closed down and the staff working there was absorbed in other posts from the executive group. Thus, full time centre sales managers are of executive group. Since 1st April 1976 the scales of workers in executive group time keepers, telephone operators, milk despatchers are the same as per recommendations of Bhole Commission. The Complainants are much seniors to the Respondents Nos. 4 to 11. The seniority list of the executive group of class III employees was prepared in 1983, in which the Respondents Nos. 4 to 11 were shown as a juniors to the present Complainants. The promotions were given on the basis of seniority list of 1983. The Respondents Nos. 4 to 11 did not raise any grievance against the seniority list of 1983, therefore, it is binding on them. The seniority list was prepared by the Respondent No. 2 in 1992 and the position in that seniority list was the same as was given in the seniority list of 1983. Further, the seniority list was prepared by the Respondent No. 2 of the executive group in 1994 by which the Complainants were disturbed as the Respondents Nos. 4 to 11 were wrongly shown as seniors to the Complainants. Therefore, the present Complainants made individual representations challenging the said seniority list and the Respondent No. 2 had rightly considered the said representations and prepared the final seniority list in 1995 in conformity with the seniority lists of 1992 and 1993. Despite all this, the Respondents Nos. 1 to 3 shown favours to the Respondents Nos. 4 to 11 by circulating the letter dated 26th November 1996.

7. In fact, the posts of full time centre sales managers were created for the first time in 1964. The Complainants are not at fault because they were transferred to other executive groups, therefore, they should be juniors to the Respondents Nos. 4 to 11. By showing the Complainants juniors to the Respondents Nos. 4 to 11 caused serious injustice to the Complainants. In fact, the seniority listers of 1983, 1992 and October, 1995 should have been considered by the Respondents Nos. 1 to 3 while dealing with the issue of promotion of the staff of executive group. The seniority list of 1996 is illegal, improper and unjust, because the said seniority list is prepared to show favour to the Respondents Nos. 4 to 11 and other set of workers, regardless of merits, therefore, it is necessary to quash and set aside the said seniority list and the seniority lists of 1983, 1992 and October, 1995 shall be confirmed.

8. Respondents Nos. 4 to 11 have not filed their written statement, however the Respondents Nos. 1 to 3 strongly resisted the claim of the Complainants as per their written statement Exh. CA-2. (here in after the Respondents Nos. 1 to 3 are referred to as the answering Respondents). It is contended by the answering Respondents that the Complaint is not maintainable in view of the similar Complaint (ULP) No. 956 of 1996 is pending. According to the answering Respondents, the Complaint does not fall under item 4(c), (d) and (e) of Sch. II and under item 5 of Sch. IV of the MRTU and PULP Act. It is admitted by the answering Respondents about the decision taken by the Government of Maharashtra not to run the milk

centres and the full time centre sales managers have been absorbed and have been given employment on fresh terms and condition. According to the Respondents, the seniority lists published from time to time are legal and proper., and no injustice is caused to the Complainants. It is contended by the answering Respondents that the seniority list of 1995 was prepared as per the Govt. Resolution dated 12th May 1962 and declared the same on 26th November 1996. It is contended by the answering Respondents that the employees working in the pay scales of Rs. 975-1540 are transferred on the post of pay scale of Rs. 975-1660. According to the answering Respondents, the seniority list was declared on 26th November 1996. It is contended by the answering Respondents the post of full time centre sales manager is covered in the executive group. Further, they have contended that instead of terminating the services of the full time centre sales managers, they have been absorbed in other categories wherever vacancies were available. They have further contended that the telephone operators were absorbed in executive group as per their requests and accordingly shown in the seniority list without causing injustice to any employee. Lastly, it is contended by the answering Respondents that the seniority list has been finalized and published on 26th November 1996 after considering the representations and objections, therefore, the Complaint is not maintainable.

9. On the basis of the pleadings of the parties, my learned Predecessor was pleased to frame the following issues in the respective Complaints, to which I have noted my findings as under :—

*Issues in Complaint (ULP) No. 956 of 1996—*

| *Issues* | *Findings* |
|---|---|
| 1. Whether the Complainant has proved that the Respondents have committed unfair labour practices under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act 1971 ? | (1) Yes. |
| 2. Whether the Complainant is entitled to get reliefs as prayed in the Complaint ? with retrospective | (2) Entitled for relief of promotion, but not with retrospective effect. |
| 3. What orders ? | (3) Complaint is partly allowed. |

*Issues in Complaint (ULP) No. 35 of 1997*

| *Issues* | *Findings* |
|---|---|
| 1. Whether the Complainant has proved that the Respondents have committed unfair labour practices under itmes 4(c), (d), (e) of Sch. II and under item 5 of Sch. IV of the MRTU and PULP Act ? | (1) No. |
| 2. Whether the Complainants are entitled to the reliefs as prayed for in the Complaint ? | (2) No. |
| 3. What orders ? | (3) Complaint is dismissed. |

**Reasons**

10. In order to consider rival contentions of the respective complaints, the seniority lists of the employees covered under the executive group of the Respondents Nos. 1 to 3 of the years 1983, 1992 and 1995 and the seniority list declared on 26th November 1996 are relevant. The Complainants in Complaint (ULP) No. 35 of 1997 are members of Dugdhashala Kamgar Sanghatana who were initially appointed as the full time centre sales managers during the period of 1964-65. The Respondents management took decision to close down the milk centres at various places in Mumbai to give it to the private parties and accordingly during the period

from 1976 to 1980 the said centres were closed. The Complainants in Complaint (ULP) No. 35 of 1997, therefore, were absorbed in executive group by transfer. The employees mentioned in Annexure-A, who are the Respondents Nos. 4 to 11 in Complaint (ULP) No. 35 of 1997 were appointed as the milk despatchers. Because of the milk centres in Mumbai closed down in between 1976 to 1980, the employees working as full time centre sales managers, including the Complainants, were absorbed in the category of executive group. In the seniority list of 1993, the Complainants in Complaint (ULP) No. 35/1997 were shown as seniors in the seniority lists of 1992 and 1995. The seniority list of 1995 was challenged by the employees mentioned in Annexure-A on the ground that it was not prepared as per the Govt. Resolution dated 12th May 1962. Clause (f) of the Govt. Resolution dated 12th May 1965 is reproduced below :—

> "(f) If a person directly recruited and appointed to a post in the higher cadre in absorbed in lower cadre consequent on the abolition of the post held by him, his seniority in the lower cadre will be fixed from the date of his appointment in the lower cadre and he will not claim seniority over others in the lower cadre appointed prior to his appointment to the lower cadre."

Placing reliance on the clause (f) of the Govt. Resolution dated 12th May 1962, the Complainants union in Complaint (ULP) No. 956 of 1996 has come forward for the relief of the employees mentioned in Annexure-A, for correction in the seniority list prepared in 1995 considering the promotions of the concerned employees with retrospective effect. Clause (f) of Govt. Resolution dated 12th May 1962 is very much clear in respect of the person directly recruited in the post of higher cadre if absorbed in lower cadre consequent on the abolition of higher cadre post, in such case, the seniority in the lower cadre will be fixed from the date of his appointment in the lower cadre. Therefore, the say of the Complainant union is that the Respondents Nos. 1 to 3 have rightly declared the seniority list on 26th November 1996 by withdrawing the letter dated 20th September 1996 in pursuance of the office order dated 1st October 1996.

11. The grievance of the Complainants in Complaint (ULP) No. 35/1997 are two fold. Firstly, their seniority should be confirmed as per the seniority lists prepared in 1983, 1992 and 1995 and consequently they being seniors as per the dated of their appointments are entitled for promotion earlier to the promotion given to the employees mentioned in Annexure-A. According to the Complainants in Complaint (ULP) No. 35/1997, the Complainant union has no right to challenge the seniority lists of 1983, 1992 and 1995 because the parties have acted upon on those seniority lists. The parties have led oral evidence common to both Complaints in Complaint (ULP) No. 35/1997. The Complainant Mrs. Aarti Sabnis in Complaint (ULP) No. 35/1997 has examined for herself and on behalf of other Complainants in the said Complaint, who made a statement on oath about closing of the milk centres in Mumbai during the period 1976 to 1980 and the full time centre sales managers were absorbed in the executive group. She has further stated that the Respondents Nos. 4 to 11 in Complaint (ULP) No. 35/1997 are juniors to them as per the seniority lists of 1983, 1992 and 1995 and given promotion on the basis of the said seniority lists. It has come in the evidence of the witness Mrs. Aarti Sabnis about preparation of the seniority list of the exective group on 26th November 1996 wherein the Respondents Nos. 4 to 11 in Complaint (ULP) No. 35/1997 were shown as seniors and this the management has shown favours to said employees in Annexure-A. The dispute is also come out through the evidence of Mrs. Aarti Sabnis in respect of the post of telephone operators whose seniority lists were prepared seperately. Witness Shaikh Immamuddin examined by the Complainant union in Complainant (ULP) No. 956/1996 through him brought on record the fact of abolition of the posts of full time centre sales managers because all the milk centres in Mumbai were closed down, and those full time centre sales managers were absorbed in the executive group. Witness Immamuddin made a statement on oath about preparation of the seniority lists of the telephone operators with higher pay scale and the promotional post, which was challenged by the Complainant union. According to the version of the witness Immamuddin, all full time centre sale managers were shown on the top in the seniority list of the year 1995 and the employees mentioned in annexure-A were shown juniors in the said list, therefore, the seniority list of

1995 was seriously challenged and ultimately the result came out with the action of the Respondents Nos. 1 to 3 declaring the seniority list on 26th November 1996 on the basis of which the employees mentioned in Annexure-A got promotion, but no retrospective effect was given. In the cross examination, witness Immamuddin in clear terms has admitted they have no Complaint against the Respondents Nos. 1 and 2 except giving the retrospective effect to the promotion.

12. Generally, the Court cannot give directions to the employer to grant promotion to the concerned employees. At the most, direction can be given to the employer to consider suitable employees for promotion. The criteria for promotion may be seniority cum merits or merits cum seniority. Normally, the date of appointment in particular cadre may be the basis for considering seniority. In the present case, in fact, since 1976 the posts of full time centre sales managers were abolished because of the milk centres in Mumbai were closed down and the persons working on the said posts were absorbed in the executive group during the period 1976 to 1980. Respondents Nos. 1 and 2 have prepared the seniority lists in the years 1983, 1992 and 1995 on which the Complainants in Complaint (ULP) No. 35/1997 are placing reliance and claiming promotion on the basis of the said seniority lists. But the seniority list prepared in October, 1995 by the Respondent No. 2 is challenged by the Complainant union on the ground that it was not prepared in accordance with the provisions of clause (f) of the Government resolution dated 12th May 1962. The representations and objections raised by the Complaint union have been conceded by the Respondents management and prepared and declared seniority list on 26th November 1996. According to the Complainants in Complaint (ULP) No. 35/1997, the Respondents are intending to engage in unfair labour practices under item 4(c), (d) and (e) of Sch. II and item 5 of Sch. IV of the MRTU and PULP Act. Unfair labour practices covered under item 4(c), (d) and (e) of Sch. II, which are relating to the unfair labour practices of changing seniority rating of employees because of union activities, refusing to promote employees to higher post on account of their union activities, giving unmerited promotion to certain employees with a view to sow discord amongst the other employees, or to undermine the strength of their union. Thus, it is clear that the unfair labour practices referred above on the part of the employer are relating to the concerned employees having union activities, therefore, changing the seniority and refusing to give promotions. The Complainants in Complainant (ULP) No. 35/1997 have come with the stand that because of rivalry between Dugdhashala Kamgar Sanahatana of which they are members and Maharashtra Shramik Sena, *i. e.* the Complainant union in Complaint (ULP) No.956 of 1996, the Respondents management taking advantage of this situation and under pressure favouring the employees who are members of the Complainant union. Such statement without proof of evidence is meaning less. The Complainants in Complaint (ULP) No. 35/1997 have failed to place any evidence on record, either oral or documentary, to show that the Respondents management engaged in unfair labour practices under item 4(c), (d) and (e) of Sch. II of the MRTU and PULP Act, by changing seniority and not giving promotions to the higher post. The Complainants also claiming of engaging in unfair practices under item 5 of Sch. IV of the MRTU and PULP Act, 1971 by showing favour to one set of workers regardless of merits, and giving discriminatory treatment to them. Preparing list in accordance with the rules or giving promotions on the basis of the seniority cannot be termed as an unfair labour practice on the part of the employer. In Complaint (ULP)No.956 of 1996, the Complainant union fairly admitted through the evidence of the witness Immamuddin that they have no grudge or Complaint against the Respondents management. The only relief claiming the Complainant union is to direct the Respondents management to give effect of promotion retrospectively. Possibility cannot be ruled out of considering promotions of other employees in between the period of promotions given to the members of the Complainant union till decision of these Complaints. Therefore, the right of the employees without joining them as party likely to be prejudiced. Therefore, giving effect retrospectively to the promotions of the workers in Annexure-A would likely to cause injustice to other employees without affording an opportunity or making them party to the Complaint. So also, the question may arise for considering seniority in the category of promotions of persons mentioned in Annexure-A in case prayer of retrospective effect is considered.

13. The Complainant union has brought sufficient material of having substance in their grievance for challenging seniority list prepared in October, 1995. The seniority list prepared and declared on 26th November 1996 of executive group is in accordance with the Government Resolution dated 12th May 1962, therefore, I find substance in the grievance raised by the Complainant union to that extent only, but failed to prove that the persons mentioned in Annexure-A shall be given retrospective effect to their promotions.

14. Having gone through carefully the facts and circumstances and evidence in both the Complaints, I find no substance in Complaint (ULP) No. 35 of 1997 filed by the Complainants, therefore, the same deserves to be dismissed, and the Complainant union in Complaint (ULP) No. 956 of 1996 succeeded in establishing their part of claim, therefore, said Complaint deserves to be allowed partly, as per the common order passed below :—

**Common Order**

(1) Complaint (ULP) No. 956 of 1996 is partly allowed.

(2) It is hereby declared that the Respondents Nos. 1 and 2 have engaged in unfair labour practices under item 5 and 9 of Sch. IV of the M. R. T. U. and P. U. L. P. Act, 1971.

(3) The Respondents Nos. 1 and 2 are directed to to consider the employees mentioned in Annexure-A for promotion on the post of milk despatching supervisors, if they are found suitable, on the basis of seniority list dated 26th November 1996.

(4) Complaint (ULP) No. 35 of 1997 is hereby dismissed.

(5) No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 29th August 2003.

S. R. ADAV,
Registrar,
Industrial Court, Mumbai.
Dated the 3rd September 2003.

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## IN THE INDUSTRIAL COURT, AT MUMBAI

APPEAL (IC) No. 136 OF 1994.—The General Secretary, The BEST Workers Union, 42, Kennedy Bridge, Mumbai 400 004—*Appellant—Versus*—The General Manager, The BEST Undertaking, BEST House, Mumbai 400 039—*Respondent*.

In the matter of appeal under Sec. 85 of BIR Act 1946 against the Order dated 7th May 1994 passed by VIth Labour Court, Mumbai, in Application (BIR) No. 16 of 1992.

*Present.*—Shri. P. P. Patil, Member, Industrial Court, Mumbai.

*Appearances.*— Mr. S. A. Khamkar for the Appellant.
Mr. R. G. Hegade, Advocate for the Respondent.

### Judgement and Order

(Dated the 27th August 2003)

1. The Appellant union is challenging the order dated 7th May 1994 passed in Application (BIR) No. 16 of 1992 by VIth Labour Court, Mumbai, who was in charge of IVth Labour Court, Mumbai.

2. In nut shell, the facts of appeal are as follows :—

On 2nd October 1990, the concerned employee Subhash Dadu Chawan was in the employment of the Respondent as driver driving bus in question in norh south direction and when it reached at the junction of Shahid Bhaghatsingh Road and Salgaonkar Marg, one cyclist was knocked down because of dash by the front laft portion of the bus, as a result of which the said cyclist became unconscious. He was taken to hospital and was subsequently succumbed to the injuries on 3rd October 1990. The concerned employee was served with a chargesheet under standing order 20(j) for gross negligence. During the enquiry, the charge was proved, therefore, awarded punishment of dismissal from service. The punishment of dismissal was challenged before IVth Labour Court, Mumbai, by the Appellant union in Application (BIR) No. 16 of 1992.

3. The punishment of dismissal from service was assailed on the grounds that there is no evidence to show from which direction the cyclist was coming, finding of the enquiry officer was erroneous and based on presumption and surmises. With bias and prejudice mind, the concerned employee was held responsible for the said accident and punishment of dismissal from service, which is shockingly disproportionate, was imposed. After having been heard the parties, the learned Labour Judge pleased to dismiss Application (BIR) No. 12 of 1992 by order dated 7th May 1994 which is impugned in the present appeal.

4. The Appellant union in the memo of appeal raised several grounds for challenging the impugned order such as, the order is erroneous, harsh, without considering the evidence and erroneously came to wrong conclusion while confirming the order of dismissal, therefore, claiming the Appellant union interference with the said order of dismissal passed by the Respondent by setting aside the said impugned order.

5. Heard the learned representative for the Appellant union and the learned Advocate for the Respondent.

6. The following points arise for my determination :—

| *Points* | *Findings* |
|---|---|
| 1. Whether the Appellant union has proved that the learned Labour Judge failed to consider oral and documentary evidence in its correct perspective, therefore, come to wrong conclusion ? | No. |
| 2. Whether the Appellant union has proved that the impugned order dated 7th May 1994 is illegal, perverse, therefore, liable to be quashed and set aside ? | No. |
| 3. What orders ? | Appeal is dismissed. |

**Reasons**

7. At the outset, there is no dispute about employment of the concerned employee Subhash Chawan in the establishment of the Respondent, who was working as a driver at the relevant time and discharging his duty on 2nd October 1990 in the same capacity. The cyclist was knocked down because of dash with front left portion of the bus at the junction of Shahid Bnagatsingh Road and Salgaonkar Marg, which resulted in causing head injuries and ultimately succumbed to said injuries on 3rd October 1990. The concerned employee was served with the chargesheet under standing order 20(j) for gross negligence. Normally, in case of an accident, the driver was at fault exclusively or there is a contributory neglience that should be examined in the light of oral, documentary evidence and punchanama. Let us go through the oral evidence led by the parties before the enquiry officer, because they declined to examine any witness before the Labour Court. The joint purshis Exh. CU-1 was filed by the parties before the Labour Court stating therein that they do not want to lead any oral evidence. The intention of the parties is thus clear that they are placing reliance on the enquiry papers including the oral evidence led before the enquiry officer and the same has been discussed and appreciated by the learned Labour Judge. Inspector Solunkhe received a message about accident, therefore, he went to the place of incident and by this time the police had prepared the punchanama. The certain admissions had prepared the punchanama. The certain admissions given by the witness Salunkhe in his cross examination to the effect that the bus driver might have tried to avoid the contact of cyslist which could get from the skid marks on the road. It has come in the evidence of Salunkhe that there was no blood stain on the body of the bus. In the evidence, Inspector Salunkhe tried to show that the accident occurred due to negligence of the cyclist. From the statements of the bus conductors, it reveals that after halting the bus at Sasoon Dock, the driver took his bus on line but after few meters from the said bus stop, he applied emergency brakes all of a sudden as a result of which, the bus swerved towards the right side and halted near the setback stands at the junction of two roads. Therefore, both the conductors alighted from the bus and noticed that one cyclist was lying down inside the front right side portion of the bus. Thus, it is clear from the evidence of the conductors that the bus was parked near the rightside footpath at the junction of the roads. The conductors could not say as to what was the speed of the bus. But according to them, the injured was lying under the front right side portion of the bus, but not under the wheels of the bus. The witness Khan seems to be the witness to the incident immediately went to the place who made a statement that the bus was completely on wrong side and there were skid marks 46 feet from the middle of the road till the ending by the right side. The witness Harawade had visited the spot and found that the front portion of the bus was in contact with Electric Pole. This witness has admitted in his cross-examination the fact that the bus had gone from the middle of the road and dashed against the electric pole located at next side of the road. The reference is also come in the evidence of another Inspector of having noticed the skid marks in a range of 40 to 45 feet across the road and seen the blood marks in front of the bus. The witness Tamboli taxi driver has thrown some light to the incident being the person having an opportunity to see the happenings. According to the witness taxi driver Tamboli, he had noticed that one cyclist emerging from the gate of the company by east side of the road, one double decker bus was proceeding in normal speed dashed against the cyclist as a result of which, the cyclist fell down on the road. Further witness Tamboli has stated in his cross examination on that day it was raining and the accident occured due to negligence of the cyclist. The driver Subhash Chawan has examined himself and made a statement on oath to the effect that he had haulted the bus at all the bus stops and after leaving Sasoon Dock passing about 200 ft he concentrated towards the right side in order to see whether any vehicle coming from Salgaonkar Marg and immediately after few seconds one cyclist emerged from the leftside of the road and dashed against the front left side of the bus. Further, the driver Subhash Chawan has stated that immediately he applied emergency brakes and hand brakes, but it was of no use since the surface was slippery due to raining. According to the witness Subhash Chawan, (driver), the bus was stopped at about 25 to 30 feet at the right side of the road. There after he alighted from the bus and found that the cyclist was lying in front of the right side of the corner of the bus. According to this witness also, the accident took place in the middle of the road.

8. The learned Labour Judge after scanning oral and documentary evidence come to the conclusion that the accident occured due to the negligence of the driver Subhash Chawan, and this finding is seriously assailed by the Appellant on the grounds that the proper attention is not given by the learned Labour Judge to the facts, circumstances, evidence oral and documentary, therefore, come to wrong conclusion. The learned representative for the Appellant during course of arguments made submission that the driver is not solely responsible for the accident being case of contributory negligence, dismissal from service is not legal, therefore, reinstatement should have been granted alongwith back wages by the learned Labour Judge. To substantate this contention, the learned representative for the Appellant has placed reliance on the case of North West Karnataka Road Transport Corporation *V/s.* S. D. Ghatage reported in 2001, LLR 384 Karnataka, wherein held in Para 8 that :—

> "Undoubtedly, the law enjoins upon the driver of the vehicle to take due care and caution, to look out for the aspect of the other persons fault and more importantly to take not only an anticipatory but even defensive action, but all of these will be totally useless if the victim behaves in a downright suicidal manner."

There is no doubt if any driver negotiating a vehicle through crowded streets where persons are moving about hurriedly in an excited manneis required to anticipate the dangers, which undoubtedly are attributable to the persons outside the vehicle and that this does not mean that the vehicle should be driven in a manner impervious of these factors and regardless of consequences and safety. The learned representative for the Appellant has further submitted that the concern driver Subhash Chawan has been acquitted from the Criminal case charges as he was not at fault and this fact again helped the driver to claim reinstatement. Even though the driver Subhash Chawan in acquitted in criminal case, may be on account of different reasons, or for want of evidence. But in the instant case, enough material is brought on record to establish the misconduct for which the driver was charged.

9. The representative for the Appellant has taken me through the material observation made by the learned Labour Judge in its judgement/order, particularly the observations relating to the contradictions in the statement of the driver that the cyclist was dashed with the bus for 10 feet and the bus went to the wrong side, on the basis of which trying to convince the Court that there was no correct application of mind for consideration of facts and evidence, therefore, necessary to interfere with the impugned order. The learned Advocate for the Respondent has urged that when there is no challenge to the fairness of enquiry, the only question before the learned Labour Judge was to determine whether the findings of the enquiry officer is perverse. The learned Advocate for the Respondents has given more emphasis on the observations and findings of the learned Labour Judge while appreciating the evidence and the enquiry report. According to the Respondent, the findings of the enquiry officer are based on sufficient material and legal evidence and reasonable man would believe in the given circumstances that the driver is only responsible for the accident. During course of arguments, he tried to bring certain facts to the notice of this Court, particularly, the fact of 15 to 20 feet dashed the cyclist. This shows that the bus was in the high speed. The learned advocate for the Respondents is taking help of the case of State of Haryans *V/s.* Rattan Singh and others reported in 1977 LAB IC 845 SC, and tried to demonstrate that "In a domestic enquiry, the strict and sophisticated rules of evidence under the Evidence Act may not apply and all materials which are logically probative for a prudent mind are permissible." To substantiate the same point, also placing reliance on the case of Municipal Corporation of Greater Mumbai *V/s.* M. S. Apte and others in Appeal No.1179 of 1982 decided by our Hon'ble High Court (Ordinary Original Civil Jurisdiction).

10. According to the Appellant, in the circumstances of the present appeal, even presume that the bus driver Subhash Chawan to some extent was at fault, in that circumstances also, the punishment of dismissal from service is shockingly disproportionate, therefore, interference is necessary at the hands of this Court. While considering the quantum of punishment, other aspects are necessary to be taken into account such as, seriousness of charges levelled against

the delinquent (employee), the misconduct under which circumstances was committed and past service record of the concerned employee. The learned Advocate for the Respondents is placing reliance on serveral reported cases to prove that the punishment of dismissal from service was the only adequate punishment. In the case of Shivram *V/s.* Maharashtra State Road Transport Corporation reported in 1994 I LLR 383 Bombay, wherein held that "Looking to the previous record and the accident involved in the instant proceedings giving further chance by granting reinstatement would be seriously dangerous to the life of the passengers and public." It is not the first occasion where the driver Subhash Chawan was involved in the accident, but there has been several acts of misconducts on his part while driving the vehicle. Therefore, the learned Labour Judge has rightly refused to show sympathy while dealing with the issue of quantum of punishment. It is held in the case of BC Chaturvedi *V/s.* Union of India and others reported in 1996 I CLR 389 SC, in Para 18 that,—

> "A review of the above legal position would establish that the disciplimary authority, and on appeal the Appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude of gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty."

The learned Labour Judge while dealing with the quantum of punishment has taken into consideration the past service record of the driver (employee) Subhash Chawan. As many as six instances are at the credit of the said employee, who was punished during past 5 years for several misconduct, including the misconduct of gross negligence is covered under standing order 20 (j). The service record of the concerned employee is available on record, which speaks involvement of the said employee for the misconduct covered under standing order 20 (j) and also other series of misconduct committed by him and repeated the same right from 1982 till 1990. Thus, it is clear that the Appellant failed to prove that any sympathy or discretion entitled for lesser down the quantum of punishment. The learned Labour Judge has discussed in length oral as well as documentary evidence and it having been weighed in a correct manner rightly refused to interfere with the punishment of dismissal from service. There is no error, illegality or perversity find place in the judgement or order, therefore, no interference is called for. In this back ground, the present appeal deserves to be dismissed as per the order passed below.

**Order**

Appeal (IC) No. 136 of 1994 is dismissed, with no order as to costs.

Records and proceedings of Application (BIR) No. 16 of 1992 be sent back to IVth Labour Court, Mumbai.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 27th August 2003.

S. R. ADAV,
Dy. Registrar,
Industrial Court, Mumbai.
Dated the 3rd September 2003.

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## IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 65 OF 2003.—Mumbai Mazdoor Sabha, Kemnedy House, Goregaonkar Road, Mumbai 400 007—*Applicant—Versus*— (1) M/s. Maharashtra State Co-op. Consumers Federation Ltd., 87/A, Raj Chamber, Devji Rattansi Marg, Dana Bunder, Mumbai 400 009, (2) Managing Director, M/s. Maharashtra State Co-Op. Consumers Federation Ltd., 87/A, Raj Chamber, Devji Rattansi Marg, Dana Bunder, Mumbai 400 009—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

*Appearances.*—Shri Sunil Kharwal, Advocate for the Applicant;
Shri K. M. Shetty, Advocate for the Opponents.

### Judgement

1. The learned Presiding Officer of the First Labour Court Mumbai by his order dated 15th March 2003 passed below Exh. U-23 in Complaint (ULP) No. 31 of 1993 rejected the application filed by the Complainant union in which, it was prayed that the issue that the employee is a workman alone should not be decided as preliminary issue but all the issues should be decided and the Complaint should be disposed of finally. Being aggrieved by the said order, the present Revision Petition has been preferred.

2. The facts giving rise to the filing of the present Revision Petition are very simple. The Complainant union had filed Complaint (ULP) No. 31 of 1993 in the First Labour Court at Mumbai in which it was alleged that the Respondent had indulged in unfair labour practice within the meaning of item 1(a), (b) (d) (e) (f) and (g) of Schedule IV of the MRTU and PULP Act, 1971 (hereinafter called as "the Act") in ordering the dismissal of Shri G. A. Indurkar, a member of the said union.

3. The employer filed written statement in the matter. In that the employer challenged the status of Shri Indurkar. It was claimed that he was not a workman. Accordingly, the learned Judge of the Labour Court framed a preliminary issue and decided to hear the said issue as a preliminary issue. The Complainant union then presented an application at Exh. U-23 requesting the Court that the Court should not decide the matter in piece-meal but all issues should be decided together. After herein the parties, the learned Judge found favour to decide the preliminary issue singally and eventually rejected the application by his order dated 15th March 2003. This particular order is the subject matter of the Revision before this Court.

4. From the submission advanced at bar, following points arise for determination.

*Points.*— 1. Did the Lower Court Commit error in rejecting the application at Exh. U-23 in which prayer was made to hear all the issues together and decide the Complaint finally ?

2. What orders ?

*Findings.*— Yes.

As per final order.

### Reasons

5. The elaborate submissions have been advanced in the matter from the rival sides. The Complainant wants that the entire complaint should be disposed of instead of deciding the issue piece-meal. The learned Advocate for the Respondent submits that such an issue in the piece-meal also can be decided. However, the following observations in the case of *D. P. Maheshwari, AIR 1984-SC-153* will indicate that if the employer takes the issue of the finding of the workman to the highest Court and if the highest Court holds that the Complainant is a workman, the second round of litigation will again start and it will cause great prejudice to the employee as well as the employer.

> "It was just the other day that we were bemoon the unbecoming devices adipted by certain employers to avoid decision of industrial disputes of merits. We noticed how they

would raise various preliminary objections, invite decision on these objections in the first instance, carry the matter to the High Court under Article 226 of the Constitution and to this Court under Article 136 of the Constitution and delay a decision of the real dispute for years sometimes for over a decade. Industrial peace, one presumes, hangs in the balance in the meanwhile. We have no before us a case where a dispute organating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on a preliminary objection. There was a time when it was thought prudent and wise policy to decide preliminary issue first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Art. 226 of the constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Art. 226 of the constitution nor the jurisdiction of this Court under Art. 136 may be allowed to be exploited by those who can well afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Art. 136 are not meant to be used to break the resistance of workman in this fashion. Tribunals and Court who are requested to decide preliminary question must therefore ask themselves whether such threshold part jurisdiction is really necessary and whether it will not lead to other weaful consequences. After all tribunals like industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Art. 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at inter-lucutory stages and on preliminary issues."

Thus, if the aforesaid observations persuade in favour of deciding all the issues in dispute at the same time, without trying some of them as preliminary issue. Therefore, the order of the Lower Court suffers from illegality and the same is required to be set aside by this Court. Hence, the order.

**Order**

(*i*) The Revision Petition is hereby allowed.

(*ii*) The learned Judge of the Lower Court is directed to frame all the issues and then decide them altogether and finally dispose of the Complaint expeditiously.

(*iii*) The Record and Proceedings be sent back forthwith to the Lower Court.

P. K. CHAVARE,
President,
Industrial Court, Maharashtra, Mumbai.

Mumbai,
Dated the 11th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

## IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 87 OF 2003.—1. Glaxo Smithkline Pharmaceuticals Limited, 252, Dr. Annie Besant Road, Worli, Mumbai 400 019—*Applicant—Versus*—Mr. Vijay Baskar, C/o. The Federation of Medical and Sales Representatives Association, Bombay Unit, 48, Chanchal Smrurti, Katrak, Wadala, Mumbai 400 031, 2. Mr. Singhne, Presiding Officer, 9th Labour Court, Mumbai—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

*Appearances.*—Shri P. N. Salgaonkar, Advocate for the Applicant;
Shri Vinod Shetty, Advocate for the Opponent.

### Judgement

1. This is an application filed by the Revision Petitioner Company under Section 44 of the MRTU and PULP Act, 1971 (hereinafter referred to as the "Act" for the sake of brevity) to challenge the order passed by the learned Presiding Officer 9th Labour Court, Mumbai on 3rd February 2003 in Complaint (ULP) No. 536 of 2000 filed by the Respondent No. 1. The facts giving rise to the filing of the present Revision Petition are listed below :—

2. The Respondent No. 1 was appointed as Medical Representative with the Revision Petitioner Company and was stationed at Mumbai Branch Selling area at Hyderabad. His services were confirmed with effect from 15th October 1997. He was transferred by an order dated 3rd December 1998 to Rajkot with effect from 22nd January 1999. He did not resume the duty at Rajkot till 8th April 1999. (It is claimed that he was ill in that period). Thereafter for certain alleged misconduct, the chargesheet was issued to him on 13th August 1999 and after completing necessary enquiry, he was terminated from service on 14th August 2000. He challenged the said termination before the Labour Court by filing Complaint (ULP) No. 536 of 2000 alleging that he was victimised by the Petitioner Company for the union activities and the unfair labour practice within the meaning of items 4 (a) and (f) of Schedule II and items 1(a) (b) (d) (e) (f) and (g) of Schedule IV of the Act were committed by the company.

3. During the pendency of the Complaint, the employee filed an application Exh. U-2 for reinstatement in service. In reply to the said application, the employer filed the affidavit of one of its Senior Officer from the managerial cadre and raised various contentions such as the employee was not the workman within the meaning of section 2(s) of the Industrial Disputes Act and the Labour Court constituted under the Act has no jurisdiction to entertain the Complaint filed by the employee. It is also denied that any unfair labour practice was committed.

4. The learned Judge of the Lower Court while passing the order below application for interim relief of Exh. U-2 observed that unless the Court records the finding that the enquiry was not fair and proper, the hearing of the application could not be undertaken forthwith. Therefore, the learned Judge by the said order directed that the application for interim relief be postponed till issue regarding the fairness of enquiry is decided.

5. In the body of the said order, the learned Judge mentioned that the employer has not filed written statement on record and it will take time to ripe the matter for evidence on the issue regarding the fairness of enquiry and, therefore, the learned Judge was of the view that it was just and proper and legal to direct the Revision Petitioner to deposit wages equal to last drawn wages in the Court till the interim relief application is decided. This order directing Revision Petitioner to deposit the wages month to month in the Court has been challenged in the present Revision Petition.

6. Eleborate submissions have been advanced by Shri P. N. Salgaonkar Advocate for the Revision Petitioner and Shri Vinod Shetty Advocate for the Respondent employee.

7. From the submissions advanced at the bar, the following points arise for determination.

*Points.*—1. Did the Lower Court Commit error in directing the Revision Petitioner to deposit wages of the employee month to month ?

2. What orders ?

Findings.—Yes.

Revision Petition is allowed.

### Reasons

7. The finding of the postponement of the hearing of the application for interim relief till the issue regarding fairness of enquiry is decided is based on the law stated by the High Court of Judicature, Bombay in the reported case of *Salapur Janata Sahakari Bank Ltd. and Anr. V/s. Vilas Digamber Kamble, 2002-III-CLR-308.* In the said case, His Lordship of Bombay High Court has expressed the opinion that in such cases, it will be appropriate for the Labour Court

to postpone the consideration of the application for interim relief till the issue of validity of the enquiry is taken up for consideration of the Labour Court and decided. In the said case, the employer had consented to deposit the amount of wages directed to be paid by the Labour Court. The Labour Court was also permitted to allow the employee to withdraw the amount after furnishing security to the satisfaction of the Labour Court. In that matter, the Labour Court has awarded the reinstatement of the employee and the company came forward with an offer that it will not reinstate the employee but it was willing to deposit the amount of wages in the Court to be withdrawn by the employee after furnishing the security. This order was passed in that matter by consent of the employer. It is submitted by Shri Salgaonkar Advocate in this case that the employer had never consented that it was willing to deposit the amount of wages in the Court. According to him, unless the Court comes to the conclusion that *prima facie* unfair labour practice has been committed, it will not be justified in giving such type of direction.

8. In reply, Shri Shetty Advocate submitted that the order of the Labour Court is just and proper and the Court entertaing the Revision Petition cannot interfere unless it holds that the said order is a perverse order. Reliance is placed on the following citations :—

1. Janata Sahakar, Bank Ltd. Sangli *V/s.* Dilipkumar Hiralal Chhatbar and Ors. *1991-II-CLR-574.*

2. Hindustan Prachar Sabha and Ors. *V/s.* Dr. (Miss) Rama Sen Gupta, 1986-*I-CLR-77.*

9. As the law stand today, no interim relief can be granted so long as the Court does not record the finding that *prima facie* case is made out to say that the Unfair Labour Practice was committed. On this promiss the Court was justified in postponing the hearing of application Exh. U-2 till it records the finding on the point of fairness of enquiry. However, the material question that remains to be answered is as to whether the order of the Court can be said to be legal, and proper when the said order directs the employer to deposit the wages month to month in the Court. It was submitted by Shri Shetty Advocate that the employee is not claiming that amount, the employer is a multinational pharmaceutical company having assets worth about Rs. 3000 corers, it has enough finance to pay the amount as directed by the Labour Court. Shri Salgaonkar Advocate on the other hand states that had it been a case, the company was likely to be closed down or had it been the case that the company was a sick unit giving doubt in the mind of the Court that in the event or the success of the employee, he would find it difficult to recover the wages, then in that event, such order would not have been said to be unjustified. The learned Judge of the Lower Court has taken a note that written statement is yet to be filed in the matter and some more time would pass for the effective hearing of the complaint and, therefore, he was of the view that it would be just and legal to direct the employer to deposit the wages in the Court month to month. If the Revision Petitioner does not file any written statement in the matter, the remedy is provided by law. The Court will not be justified in directing the employer in such a situation to deposit the wages month to month in the Court. It is for the Court to decide the Complaint expeditiously by resorting the legal means. The parties do not have any role to play for expedition of hearing of the Complaint or otherwise. Therefore, the employer cannot be penalized like this by giving a direction to deposit the wages month to month in the Court. Thus, the order calls for interference in the Revisional jurisdiction of this Court. Hence, the order.

**Order**

(*i*) The Revision Petition is allowed.

(*ii*) The order passed below Exh. U-2 shall now stands to read "the application for interim relief is postponed till the issue regarding fairness of enquiry is decided ".

(*iii*) The parties are directed to appear before the Lower Court on 25th September, 2003 for enabling the Court to made further progress in the hearing of the Complaint.

No order as to costs.

P. K. CHAVARE,
President,
Industrial Court, Mumbai.

Mumbai,
dated the 11th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai,
dated the 20th October 2003.

## IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 9 of 2003—Dr. Ganesh T. Panse, 64 Sagandhalaya, Sion (E), Mumbai 400 029—*Applicant—Versus*—(1) Tata Memorial Hospital/Tata Memorial Centre, E. Borges Marg, Parel, Mumbai 400 012, (2) Dr. (Ms.) K. A. Dinshaw, Director, Tata Memorial Hospital/Tata Memorial Centre, E. Borges Marg, Parel, Mumbai 400 012, (3) Cheif Executive Officer, Tata Memorial Hospital/Tata Memorial Centre, E. Borges Marg, Parel, Mumbai 400 012,—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

*Appearances.*—Shri R. D. Bhat, Advocate for the Applicant;
Shri G. Kurian, Advocate for the Opponents.

### Judgement

1. While hearing the application for interim relief under the provisions of Section 30(*2*) of the MRTU and PULP Act, 1971 (hereinafter called as "the Act" for the sake of brevity). At Exh. U-2 in Complaint (ULP) No. 502 of 2002, the learned Presiding Officer of the 12th Labour Court, Mumbai by his order dated 16th December 2002 rejected the said application and being aggrieved by the said order, the present Revision Petition has been filed under Section 44 of the Act.

2. The facts which are not seriously in dispute which have laid to the filing of the present Revision Petition are listed below.

3. The Complainant Revision Petitioner is working as Scientific Officer with the Tata Memorial Hospital (the Respondent) since last more than 20 years. He is mainly concerned with research. At the material time, he was entrusted with the research relating to earlier detection of Cancer of Esophagus.

4. Dr. R. F. Chinoy, Professor and Head of the department of Pathology is also working T. M. H. She addressed a letter dated 21st June 2000 to the Revision Petitioner stating there in that she had spoken to him almost two months ago regarding his work duties and assignments in the department. The letter further reads that the Petitioner has promised to give her written write-up about his activities and suggestions for working in the future. The said write-up was supposed to be furnished by 28th June. The letter further read that it was almost a month since then and he has not then her or seen her at all. It is mentioned in the letter that the Petitioner should see her with necessary write-up immediately. The copy of the said letter was endorsed to the Respondent as well as to the Human Resources Development Officer of the said Hospital. Thereafter on 25th July 2000, the Revision Petitioner addressed a confidential letter to Dr. (Mrs.) Chinoy. In the said letter, he gave certain details about his discussion with the future research project with six friends in Mumbai. He also mentioned in the letter that research project was very expensive and was of long duration requiring about Rs. 7 lakhs a year for expenses. The letter further added that he was prepared to work on the research project provided that funds of Rs. 35 lakhs are sanctioned in the coming 5 years along with other proper basic and research facilities. The letter further read that if the funds are not sanctioned within next 3 months, he will give up the idea and will continue to work on going research "RIA development project for Esophagus Cancer". It is also stated that part of this project was going to be presented at the international OESO 6th World Congress to be held in Paris on Friday 1st September 2000 at 1.00 p. m. It is further mentioned in the said letter that he did not come

to see Dr. (Mrs.) Chinoy because the proposed research project was not going to be sanctioned by the T. M. C. Management even with her favourable opinion/positive efforts. It is further stated in the said letter that the letter dated 21st July 2000 was received by him on 24th July 2000 at 10.10 a. m. and the reply to the said letter will be communicated in due course because the Petitioner has very strong objections regarding certain issues that are mentioned in the letter.

5. In reply to the said letter, Dr. Chinoy addressed one more letter on 3rd August 2000. In the said letter, she mentioned that if he was serious about the research project, it will be operational for 5 years and will cost Rs. 7 lakhs per year, then he must write proper project report to the hospital Scientific Review Committee and the Committee will evaluate the suitability and utility of such a project. It was also mentioned in the said letter that the wording "Please note that I will drop the idea of the project if it is not sanctioned by you and T. M. H. Management in coming 3 months" is very strange and almost sounds like a threat. The letter further read that since you claim to be working in the research, you should know the guidelines for dealing with the project and the methodology for writing up the project for scrutiny of the Scientific Committee. The said letter further read that if the Petitioner was serious about the same, he should write down the proposal in proper format and send to the Committee concerned.

6. On 7th August 2000, the Revision Petitioner addressed a letter to Dr. (Mrs.) R. F. Chinoy mentioning that it should be treated as reply to the letter dated 21st July 2000. In the said letter, the Petitioner mentioned that by writing a letter dated 21st July 2000 to him, Dr. Chinoy has crossed the limit of her power in T. M. H. It was stated in the said letter Immuno Biochemistry Laboratory of T. M. H. was never under Pathology Department since the beginning *i.e.* from last 20 years. It was stated in the said letter that it should be noted that as a Research Scientist, his duties are, his research work or experiments and reading new references in the science and to start new research project and his assignments are his research projects and their yearly assessment is not on simply the number of hours in the laboratory doing unfruitful and non sense expensive experiments and of crorers of rupees. It was also stated in the said letter that he was closing this matter here and hers only and if she or the T. M. C. continued to send such notes again, he will be forced to hand over them to his father-in-law Justice V. V. Joshi (Judge of the Mumbai High Court, Nagpur Bench) and also to the solicitors or lawyers in Mumbai for necessary legal action against Dr. chinoy and T. M. C. Management. Along with that letter, Dr. Panse the Revision Petitioner has returned the Original letter that was addressed by Dr. Chinoy to him on 21st July 2000 by making various comments about the said note in that note itself. The letter dated 21st July 2000 was addressed to Dr. G. T. Panse and below that words "T. M. H." were written. On that, Dr. Panse commented that instead of T. M. H. full form was essential because the said letters were used for the first time. Dr. Chinoy had addressed copies of the letter dated 21st July 2000 to the Director, T. M. C. and to the H. R. D. O. T. M. C. and there again Dr. Panse made the comment that full form of T. M. C. as well as H. R. D. O. T. M. H. was essential because whether it means "Horse Riding Development Officer of Throat Male Hostel". On that Dr. Chiony made endorsement in the name of Chief Administrative Officer (C. A. Oak/H.R.D.O.) to take immediate action against such a companion. Dr. Chinoy then addressed a letter to the Director, T. M. C. On 10th August 2000 stating therein that the comments of the Revision Petitioner were childish and belligerent. The letter mentioned that the Director should go through the entire correspondence and if necessary, show it to T. M. H. Lawyers also. It was mentioned in the letter that the language in the letter was rude language and it was surprising that Ph. D. staff members could write in

this manner. On that, Director made on endorsement in the name C. M. O./H. R. D. O. that the action be taken and singed that endorsement on 25th August 2000. On 28th August 2000, H. R. D. O. transferred the Revision Petitioner to the Department of Pathology, T. M. H. and was directed to report Dr. Chinoy, Professor and Head of Department of Pathology with immediate effect. On 30th August 2000, Dr. Panse addressed a letter to the H. R. D. O. by stating therein that from last 27 years, he was in Biochemistry Research field and had 22 Original research papers to his credit. The letter further read that his Biochemistry Research fields included Biochemistry of Carbohydrate Metabolism, Protein Biochemistry, Endocrine Biochemistry and immuno Biochemistry and these 4 research fields in Biochemistry have no connection with Pathology even in far remote way. The said letter further read that because of these 4 scientific facts, the Petitioner was compelled to refuse his transfer order from Immuno Biochem. Laboratory and posting to department of Pathology with effect from 28th August 2000. The Chief Admistrative Officer by his letter dated 31st August 2000, then replied the letter dated 30th August 2000 that the posting of Petitioner to Pathology Department was effected after considering all the issues and points mentioned in his letter dated 30th August 2000 were considered by the Competent Authority who has found it appropriate to post him to Pathology Department. The said letter further read that he was advised to report immediately to the Department of Pathology failing which appropriate disciplinary action will have to be taken for willful insubordination of reasonable orders issued by the Competent Authority. With effect from 31st August 2000, by another order, the C. M. O. Declared that Immuno Biochem Laboratory will seize to exist with immediate effect and the staff working in the said Department was posted to Pathology Department was required to report to Head, Department of Pathology, T. M. H.

7. The Chief Administrative Officer by his letter dated 22nd September 2000 styled as show cause notice asked the Petitioner to explain about the objectionable remarks which he has made in the letter dated 21st July 2000 and also threatened in intimidatory tone to Dr. Chinoy and the management of T. M. C. By the letter dated 7th August 2000. Thereafter Dr. Panse the Revision Petitioner replied the said show cause notice. In the said reply, he mentioned that he was not under direct subordination of Dr. Chinoy and, therefore, replies which he had given were proper. He mentioned in the said letter that he has not mentioned any bad words. After considering the said reply, the Director gave him a chargesheet on 9th February 2001 mentioning that the conduct evidenced by the remarks containing a letter dated 21st July 2000 by Dr. Chinoy and his explanation dated 9th October 2003 were sub-versive of good discipline and behavour and he was asked to explain the said conduct. In reply to that, the Revision Petitioner stated that he denies all the allegation and added that he had no intention to offend Dr. Chinoy. He further stated that during the material period *i. e.* prior to 21st August 2000, technically, she was not his head as he was working in Immuno Biochem Laboratory. Therefore, he was agitated on the point that she asked certain explaination from him and was under great stress as a sequence of events clearly showed that invisible hand was playing the tricks behind scene in order to remove his post, seniority, promotion and recognition in the research field and ground for research itself. It was stated in the said letter that he had joined the T. M. H. Kamgar Sanghatana internal union around 8th May 2000 and Dr. Chinoy called him on 24th May 2000 for alleged enquiry regarding his duties and assignments in the department. At that time, the Petitioner was working in Immuno Biochem Labouratory which was manned by him alone. The letter further read that Pathology Department and Immuno Biochem Labouratory were 2 different department and, however, all of a sudden a letter was addressed to him by H. O. D. of Pathology on 21st July 2000 seeking his work report. The letter further read that this was triggering point of his anger in angry mood, he addressed the letters on 25th July 2000 and on 7th August 2000. It was stated that he has used satire in his language and requested the

authority to treat it as a mild way of intellectual protest and it should not be taken so seriously as it does not amount to subversive of good discipline and conduct. It was mentioned in the said letter that since the Petitioner became active member and office bearer of Tata Memorial Hospital Kamgar Sanghatana, a vindictive attitude of the administration has become visible. An enquiry officer was appointed in the matter and enquiry was completed and the charges of misconduct were held to be proved and thereafter report was submitted to the Competent Authority. Thereafter, a show cause notice was issued to the Petitioner, the Petitioner replied that show cause notice and final punishment is yet to be awarded in the matter.

8. Before such final punishment was awarded, the Revision Petitioner filed Complaint before the Labour Court on 19th October 2002 alleging that the employer has engaged in the unfair labour practice within the meaning of items 1(*a*), (*b*), (*d*), (*f*) and (*g*) of Schedule IV of the Act. It was prayed in the said complaint that the Respondent be directed to desist from engaging in the unfair labour practice complained of and the Court be pleased to quash and set aside the show cause notice dated 22nd September 2000 and the chargesheet dated 9th February 2001. It was further claimed in the said Complaint that pending hearing and final disposal of the Complaint, the Respondent be directed not to pass final order in the present case.

9. Number of points were raised in the written statement that was filed at Exh.C-3 and denied all the material allegations of unfair labour practice alleged.

10. Alongwith the Complaint, an application Exh. U-2 for interim relief under Section 30(*2*) of the Act was filed. It was prayed that pending the hearing and final disposal of the Complaint, the Respondents be directed not to pass final order in the case. By the reasoned order, the learned Presiding Officer of the 12th Labour Court, Mumbai rejected the application Exh. U-2 on 16th September 2002 and this particular order is the subject matter of the Revision Petition before me.

11. From the rival submissions advanced at the bar, following points arise for my determination :—

| *Points.*— | *Findings.*— |
|---|---|
| 1. Did the Lower Court Commit error in rejecting the application Exh. U-2 warranting interference of this Court in its revisions jurisdiction ? | No. |
| 2. What orders ? | Revision Petition is dismissed. |

**Reasons**

12. It was submitted by Shri Bhat learned Advocate for the Petitioner that there existed strong *prima facie* case to tell that in any event, the Disciplinary Authority was likely to pass the order of discharge or dismissal and approach of the Lower Court is wrong in observing that the *prima facie* case did not exist. By making a reference to the observation of the Lower Court in para No. 17, Shri Bhat Advocate submitted that the observation of the Lower Court that in the event of victimisation by way of termination or by way of dismissal, the Complainant could be compensated at the final hearing of the case and it was not likely to cause greater hardship to him at this juncture is wrong and, therefore, this Court should interfere in the said order. It was also submitted that the learned Advocate for the Respondent while hearing the application for interim relief never objected for recording a finding that the Petitioner was not a workman and T. M. H. being an establishment of the Central Government, the appropriate Government was the Central Government and the Labour Court has no jurisdiction to try the issue. Although this was the clear position that these 2 points were not to be agitated at the interlocutory stage, the learned Judge has made certain observations on those points and has landed in

error. According to Shri Bhat Advocate, even the theatened action of discharge or dismissal gives cause of action to the employee to file the complaint and because it is the object of the act to prevent the unfair labour practices, the complaint was tenable. It was also submitted that the proposed punishment was disproportionate to the act complained of.

13. In reply, Shri G. Kurian Advocate submitted that in a number of cases, it has been decided that the final action of the application of mind of the employer should not be aborted by the interim orders given by the Courts. It was also submitted that at this moment, how one can say that the employer has determined to discharge or dismiss the employee.

14. According to Shri Bhat Advocate, as per practice of the Model Standing Orders, enquiry is necessary only when the punishment of dismissal or discharge is to be given and in all other cases, the enquiry is not necessary.

15. I have given anxious consideration to the rival submissions and gone through the volumineous case laws cited on behalf of both the sides.

16. There is no doubt about the principle that because the object of the act is to prevent the unfair labour practices, it is not necessary that the Complainant should await for filing a complaint in the Labour Court till he receives the order or discharge or dismissal. Reliance can be had on *Hindustan Lever Ltd. V/s. Ashok Vishnu Kate and Ors., 1995-II-CLR-823.* However, it does not it so facto mean that merely because a complaint of such nature is tenable, the interim relief must follow soon after the complaint of this nature is filed. The observations of High Court of Bombay in *Ashok Vishnu Kate and Others V/s. Shri M. R. Bhope, Judge, Labour Court, Bombay and Another, 1992 (3) Bom. C. R. 352* as they appear in para 9 are reproduced below :—

> "Though the employee is entitled to approach the Labour Court complaining about unfair labour practice under item 1 of Schedule IV of the Act even prior to passing of the order of discharge or dismissal, it is necessary to sound a note of caution about exercise of powers granting interim relief under sub-section (*2*) of section 30 of the Act. The Labour Court is undoubtedly entitled to pass order directing the employer to cease and desist from unfair labour practice or even to take affirmative action as may be in the opinion of the Court necessary to effectuate the policy of the Act. The Labour Court is also entitled to pass interim orders including any restrictive order directing the employer to withdraw temporarily the practice complained of pending final disposal. The powers conferred on the Labour Court or the Industrial Court, as the case may be, are of considerable importance and the Court exercising the power should be very vigilant in entering that interim orders do not result in stifling the inquiry proceedings. Merely because an employee complaints about the unfair labour practices by the employer during the inquiry, the Labour Court need not straightaway proceed the pass interim orders which would result in postponing the inquiry. The management has a right to conduct an inquiry which may lead to discharge of dismissal and that right should not be curtailed or restricted without substantial proof that the employer is indulging in unfair labour practice as set out under Item 1(*a*) to (*f*), while conducting the proceedings. It is not in every case that the Court should proceed to pass interim order on lodgment of a complaint, but care should be taken to ascertain whether the employee has made out a strong *prima facie* case indicating that the grievance about unfair labour practice is sustained. The Court should realize that unnecessary postponement of an enquiry may cause serious hardship both to the employer and the employee and, therefore, application for interim orders should be examined with a critical scrutiny. We do not wish to make any observation as to how orders should be exemined with a critical scrutiny. We do not wish to make any observation as to how the judicial powers should be exercised by the Court, but we hope and trust that the powers would be

exercised with care and a caution so as not to cause hardship either to the employer or the employee."

Thus, looking to the aforesaid guidelines, the Courts are under obligation to have critical scrutiny of the aspects involved before granting the interim relief. It was submitted by Shri Bhat advocate that if the interim relief as prayed for is not granted, the employee will be thrown on the road and starve and it will cause greater hardship to him. The fact remains that the enquiry has not been initiated on any flimsy grounds. The employee has used the words which are derogatory to the authority of the superior. Even assuming that the Professor and head of the Pathology department was not the direct superior of the employee, it is difficult to digest that he is justified in addressing such letters. Therefore, there appears to be no *prima facie* case to conclude that the employee is being victimised for the union activities. There appears to be no sound reason for this Court to interfere with the orders passed by the Lower Court. Hence, the order.

**Order**

(*i*) The Revision Petition is dismissed.

(*ii*) The record and proceeding be sent back to the Lower Court forthwith.

(*iii*) The parties are directed to appear before the Lower Court on 22nd September 2003 for further hearing in the main Complaint.

No order as to costs.

P. K. CHAVARE,
President,
Industrial Court, Mumbai.

Mumbai,
dated the 10th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Maharashtra,
Mumbai.
dated the 20th October 2003.

———

**BEFORE THE INDUSTRIAL COURT, MAHARASHTRA, AT KOLHAPUR**

CRI. REVISION APPLICATION (ULP) No. 3 of 1992.—Shri Shirish Ramchandra Kulkarni, Chairman, Yashwant Co-op. Processors Ltd., Industrial Estate, Ichalkaranji, District Kolhapur and 13 others.—*Petitioner.*—*Versus*—Shri Shamrao Dhondiba Sawant, R/o. Block No. 61, Yashwant Co-op. Society, Kolhapur Road, Ichalkaranji, District Kolhapur.—*Opponent.*

CORAM.—Shri. C. A. Jadhav, Member.

*Appearances*.—Shri. D. S. Joshi, Advocate for the Rev. Applicant/Petitioner.

Shri. G. P. Pansare, Advocate for the Opponent.

**Judgment**

1. This is a revision by original Accused No. 1 challenging legality of order of issuing the process under section 48(*1*) of the MRTU and PULP Act against him and others in Cri. Comp. (ULP) No. 25/92 by Labour Court, Kolhapur.

2. Present Opponent (hereinafter referred to as the Complainant) filed Complaint (ULP) No. 25/92, before Labour Court, Kolhapur, under the MRTU and PULP Act. He also made an application under section 30(*2*) of the MRTU and PULP Act. Whereon learned Labour Court passed an *ex parte* order directing present Petitioner to allow him to join duties until further orders with showcause notice.

3. The Complainant filed above Criminal complaint alleging that *ad-interim* order passed in his favour was served upon present Petitioner on 3rd February 1992. However, he was not allowed to join duties, though he repeatedly visited to join duties. He made applications, joining reports, but those were not considered. Other Directors (original Accused Nos. 2 to 11) are well aware of the interim order, but failed to obey and implement the same. Finally, he alleged that present petitioner and other accused have committed an offense punishable under section 48(*1*) of the MRTU and PULP Act.

4. Learned Labour Court, on examining the Complainant on Oath passed an order on 12th March 1992 of issuing process against the present Petitioner and other accused. The same is challenged in this revision.

5. Now, following points arise for my determination :—

(*i*) Whether impugned order issuing process is required to be set aside, at this stage ?

(*ii*) What order ?

6. My findings, on above points, are as under :

(*i*) No.

(*ii*) The Revision Application is dismissed.

**Reasons**

7. Shri Joshi, learned Advocate representing the Petitioner-original Accused No. 1 argued in terms of grounds of the revision application. He submitted that Original Respondent was ready and willing to comply with *ad-interim* order of the Labour Court, but, the Complainant himself did not join and is now falsely alleging breach of the *ad-interim* order.

8. Shri Pansare, Advocate representing Complainant replied that false and frivolous pleaee are raised by the Petitioner so as to delay hearing of Original Complaint and present revision

is one of such made. The Complainant was not allowed to join duties, and therefore, Accused have to face consequences. He further submitted that the Petitioner Original Accused No. 1 can put all relevant facts before Labour Court and no interference is warranted at this stage.

9. Section 40 of the MRTU and PULP Act provides that a Labour Court shall have all the powers under section Cr. P. C. in respect of offences punishable under said Act. Consequently, the Petitioner-Accused can apply for recalling order of issuing process. Honourable Apex Court in *K. Mathew Vs. State of Kerala reported in AIR 1992 SC at Page-2206* has held that it is open to the Accused to plead before the Magistrate for varying or recalling order of process. As such, learned Labour Court has jurisdiction to vary and recall an order of issuing process. The Petitioner-Accused can well approach the Labour Court and put all the grievances raised in this revision, before the Labour Court. Consequently, no interference is called for at this stage. Accordingly, I answer Point No. 1 in the negative and pass following order :

**Order**

1. The Criminal Revision Application is dismissed.

2. R. and P. be sent to Labour Court, Kolhapur and the parties shall appear there on 1st December 2003.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 17th November 2003

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

**BEFORE THE JUDGE, EMPLOYEES' INSURANCE COURT, AT KOLHAPUR**

APPLICATION (ESI) No. 4 of 1992.—S. M. Ghatge and Sons Agencies (P) Ltd., 25, Hind Co-operative Housing Society Ltd., Ruikar Colony, Kolhapur.—*Applicant—Versus*—The Regional Director, Employees' State Insurance Corporation, PMT Commercial Complex, Swargate, Pune.—*Opponent.*

In the matter of Application under section 77 read with section 75 of ESI Act, 1948.

CORAM.—Shri C. A. Jadhav, Member.

*Appearances*.—Shri T. B. Vaze, Advocate for the Applicant.

Shri S. V. Kotnis, Advocate for the Opponent.

**Judgment**

1. This is an application under section 77 read with section 75 of the Employees' State Insurance Act for a declaration that Respondent's letter directing to pay interest of Rs. 9,054 to the Applicant Company, is bad in law and to qash and set-aside the same.

2. Admittedly, the Applicant Company is a company registered under the Company's Act, deals with sale of two-wheelers and spare parts thereof and is covered under provisions of Employees' State Insurance Act. The Respondent Corporation has allotted code number to the Company as "33-6362" long back. It is also an admitted position that the Corporation issued letter dated 29th January 1986 to the Company calling it to pay Rs. 1,00,906.75 for a specific period. After representations by the Company, Corporation's Deputy Regional Director passed an order under section 45A of the ESI Act and informed the Company by letter dated 23rd February, 1989 that contribution for the period from July, 1979 to the year 1983-84 is finally determined as Rs. 25,448.55 and the Company shall pay said amount plus interest, calculated till 31st January 1989 as Rs. 2,108.39. The Company filed Application (ESI) No. 8/91 on 27th August, 1991 challenging said action. In the mean time, the Corporation recovered Rs. 26,713 from the Company through Tahasildar. Said amount and Recovery thereof is subject matter of ESI Application No. 8 of 1991.

3. The Corporation then served another notice dated 15th November, 1991 upon the Company calling upon to pay interest of Rs. 9,054 being interest at the rate of 6% per annum for delayed payment of contribution. It then sent another letter dated 9th March 1992 to pay said interest. Corporation's demand to pay such interest is subject matter of this application.

4. It is case of the Company that the Corporation has finally determined the interest of Rs. 2,108.39 calculated till 31st January 1989, *vide* order under section 45A of the ESI Act. As such, levying further interest of Rs. 9,054 for same period, is bad in law. In fact, the contribution and damages were not determined finally till passing of the order under section 45A of the ESI Act. It is further alleged that the Company sent letter dated 19th December 1991 stating all previous facts. Even then, another letter demanding interest of Rs. 9,054 is sent. The Company then sent another letter dated 17th March 1992 reiterating all material facts but congnisance thereof was not taken. On the contrary, a Court reply was sent on 4th March 1992 that interest of Rs. 9,054 is rightly payable and recovery proceedings are initiated through Tahasildar. According to the Company, therefore the Corporation cannot levy interest of Rs. 9,054 after finally determining the interest of Rs. 2,108.39 for the period till 31st January 1989. It is case of the company that entire amounts demanded *vide* order under section 45A of the ESI Act are paid through Challans, till 29th April 1990. As such, demand of further interest of Rs. 9,054 is bad in law. Finally, the Company has prayed for requisite declaration and consequential reliefs.

5. The Company also made an interim application (Exh. 2) to stay the recovery, pending the hearing and final disposal of main application. My learned Predecessor stayed the recovery until further orders with show cause notice. No final hearing of the interim application took place. Eventually, main application itself was taken for hearing.

6. The Corporation filed its say *cum* written statement at Exh. 8 and traversed all material allegation mades by the Company. It contended, at the outset that the company has not deposited 50% amounts of the payment as provided under section 75 (*2B*) of the ESI Act and, therefore, the application is liable to be dismissed on this count itself. It is then contended that issue regarding order under section 45A of the ESI Act is unnecessarily mixed in this Application, although the same is subject matter of Application (ESI) No. 8/91. According to the Corporation, the company was not punctual in paying the contribution and, therefore, is liable to pay damages as well as interest. If the Company would have paid the contribution within time, as per regulation 31 of the Employees' State Insurance (General) Regulations it could have avoided further action. As such, notice levying interest of Rs. 9,054 and demand thereof is legal and proper. The company was given a clarificatory reply on 9th March 1992. Even then, it is unwilling to pay legal interest. Consequently, Tahasildar was rightly moved for its recovery. Interest of Rs. 9,054 is calculated in accordance with the statutory provisions, upto the date of payment. The Company made part payments and, therefore, is liable to pay interest. Finally, the Corporation justified its action of demanding interest of Rs. 9,054 and prayed for dismissal of interim as well as main application.

7. Considering rival contentions, following points arise for my determination :—

(*i*) Whether the Applicant-Company is legally liable to pay interest of Rs. 9,054, as alleged ?

(*ii*) Whether the Applicant-Company is entitled to declaration that demand notice demanding interest of Rs. 9,054 is bad in law and requisite consequential relief ?

(*iii*) What order ?

8. My findings, on above points, are as under :

(*i*) The Applicant Company is legally liable to pay interest at the rate of 6% per annum on the contribution of Rs. 25,448.55 from 1st February, 1989 till 30th April, 1990.

(*ii*) Yes, to the extent of demanding interest of Rs. 7,145.

(*iii*) The Application is partly allowed.

**Reasons**

9. It needs to be stated, at the outset, that Corporation's order of imposing damages of Rs. 26,713 is subject matter of Application (ESI) No. 8/91. Consequently, merits thereof will have to be decided in said application only. Interest of Rs. 9,054 levied on the contribution of Rs. 25,448.55 is subject matter of this Application.

10. The Company has produced copies of disputed demand letter, its representations and Corporation's clarificatory reply dated 9th March 1992, with list Exh. 4. It then produced copy of Corporation's order dated 23rd September 1989 passed under section 45A of the ESI Act, with list Exh. 15. The Corporation produced copies of impugned demand letter and its clarificatory reply with list Exh.13. None of the parties led oral evidence.

11. Shri. Vaze, learned Advocate representing the Company submitted that the Corporation is bound by its order under section 45A of the ESI Act and now cannot go behind the same. It is stated in said order that contribution of the interest payable till 31st January 1989 is determined finally. Interest of Rs. 2,108.35 is determined for the period of 10 years. However, interest of Rs. 9,054 determined for the period from 1st February 1989 till 29th April 1990 *i.e.* 15 months is unacceptable on its face. It is nowhere explained, with requisite particulars, as to how interest of Rs. 9,054 is calculated. At the most, the Company will be liable to pay interest at the rate of 6% per annum for the default period *i.e.* of 15 months only.

12. Shri. Kotnis, learned Advocate representing the Corporation replied that the Company itself has pleaded in main Application (Exh. 1) that interest of Rs. 2,108.39 is assessed for the period from July 1979 to 1984 and hence is bound by its pleading. Eventually, interest payable from the year 1984 till 30th April, 1990 is calculated and it amounts to Rs. 9,054.

13. No doubt, the Company has avered that interest levied till the year 1984, in the order passed under section 45A of the ESI Act. However, copy of said order (produced with list Exh. 15) says that interest of Rs. 2,108.39 is determined for the period ending on 31st January 1989. As such, said order will naturally prevail upon the pleadings. Even otherwise, the Corporation is now estopped from challenging correctness of the order under section 45A of the ESI Act. As such, it has to be held that interest of Rs. 2,108.39 was determined for the period upto 31st January 1989. The Corporation has stated in the clarificatory reply dated 9th March 1992 that contribution of Rs. 25,448.55 is paid by installments in March-April, 1990. As such, now there is no dispute regarding non payment of the contribution. The contribution is determined by order under section 45A of the ESI Act. Interest payable upto 31st January 1989 is also determined therein. As such, the Applicant Company is liable to pay interest at the rate of 6% per annum on contribution of Rs. 25,448.55 for the period 1st February 1989 to 30th April 1990. I answer Point No. 1 accordingly.

14. Interest payable, as above, comes to Rs. 1,908.64 (rounded to Rs. 1,909). It consequently follows that demand notice demanding amount of Rs. 7,145 is bad in law and the Company is entitled to requisite declaration as well as consequential relief. I answer Point No. 2 accordingly.

15. In the background of above discussions and findings, the application needs to be allowed partly by directing the Applicant to pay interest of Rs. 1,909 within one month from today.

16. In the result, I pass following order.

**Order**

(*i*) The Application is partly allowed.

(*ii*) It is declared that the Company is liable to pay interest of Rs. 1,909 and not Rs. 9,054 and the demand notice to the extent of demanding interest of Rs. 7,145 is bad in law.

(*iii*) The Respondent-Corporation is restrained from recovering interest as per the demand notice to the extent of Rs. 7,145. The Applicant Company is directed to pay outstanding interest of Rs. 1,909 within one month from today.

(*iv*) Parties shall bear their own costs.

C. A. JADHAV,
Judge,
Employees' State Insurance Court, Kolhapur.

Kolhapur,
Dated the 4th August 2003

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

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